Supreme Court, U.S.
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No. 06-815

IN THE

Supreme Court of the United States

JAY REIFERT,

Petitioner,

v.

SOUTH CENTRAL WISCONSIN MLS CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), with its non-exclusive indicia of when products compete in the same market, must be modified, as the Seventh Circuit held, to require plaintiffs to provide a *mandatory* "economic analysis."

2. Whether, as the Seventh Circuit held, a large firm (the National Assn. of Realtors) selling a service to an entire market does not compete as a matter of law with smaller firms selling an equivalent service to the same market for the same price because (1) the smaller firms advocate the interests of specific racial or ethnic communities, or (2) the smaller firms have more restrictive sales policies than the large firm, or (3) because the smaller firms sell to a smaller group of buyers than the large firm.

3. Whether market definition disputes are factual questions, and if so, the quantum of evidence that will bar or require summary judgment.

4. Whether the rule of the National Assn. of Realtors barring realty agents from contacting the clients of other realty agents – a practice permitted by state law – violates the Sherman Act under *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

List of Parties

Petitioner is Jay Reifert.

Respondents are South Central Wisconsin MLS Corporation, Realtors Association of South Central Wisconsin, Inc., Robert L. Courter, Susan Matthews, David Stark, Robert Weber, Thomas Bunbury, Maurice W. Hill, Peter Sveum, Marshall Zwygart, and David McGrath.

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Petition for a Writ of Certiorari

Petitioner Jay Reifert respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Seventh Circuit is reported at 450 F.3d 312 and reproduced below at 1a. The order denying panel rehearing is reported at 2006 U.S. App. LEXIS 17692 and is reproduced below at 38a. The underlying decision of the district court is reported at 2005 U.S. Dist. LEXIS 23431 and reproduced below at 24a.

Jurisdiction

Judgment of the Seventh Circuit was entered on June 12, 2006 and the order denying panel rehearing issued on July 12, 2006. On Oct. 10, 2006, this Court granted the application of petitioner to extend the time to file this petition until Dec. 11, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes Involved

The Sherman Act, 15 U.S.C. §1, provides in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." This Court has held that only unreasonable restraints are outlawed, not *all* restraints. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

The Clayton Act, 15 U.S.C. §§ 15, 26, allows private suits by individuals injured by violations of the antitrust laws.

Statement of the Case

Facts

Reifert is a real estate broker in Madison, Wisconsin. In order to purchase a subscription to the multiple listing service ("MLS") operated by respondent South Central Wisconsin MLS Corporation ("SCWMLS"), he was required to buy trade association services from three Realtor associations: (1) the local Realtor association (respondent Realtors Assn. of South Central Wisconsin ("RASCW")), (2) the state Realtors association (Wisconsin Realtors Assn.), and (3) the National Association of Realtors ("NAR").

If the three Realtor association products had not been tied to MLS services, Reifert would not have bought any of them. Reifert voluntarily buys trade association services from the National Association of Exclusive Buyer Agents ("NAEBA"), which advocates the philosophy that realty agents should not hold conflicting interests in a real estate transaction. NAEBA members like Reifert only represent buyers. In order to avoid conflicts of interest, Reifert and NAEBA members never represent sellers.

Reifert has a second objection to being forced to purchase Realtor association services: he is forced to agree to NAR rules that prohibit him from contacting property owners who have current listings with other realty agents. If it were not for the rule, Reifert would like the freedom to contact sellers – most of whom are also buyers – to advise them of his buyer-oriented services. Sellers listed with other agents have listing contracts giving the agent the exclusive right to represent them in their role as seller. Reifert has no desire to disrupt these contractual relations. Since he only represents buyers, he has no interest in

representing sellers. But property owners almost never have exclusive contracts with any agent to represent them in their role as buyers. Under Wisconsin law, Reifert would violate no law by inviting these sellers to engage him to represent them when buying another property. NAR rules prohibit such contacts. If he breaks the rule, he can be expelled from the MLS. Reifert objects to the requirement imposed by Realtor membership that he give up his right to vigorously compete with all other Realtors in the Madison area. He asserts his ability to earn a living has been impaired by the non-solicitation rules of the Realtor associations. He seeks an injunction against enforcement of the rule, but no damages for lost income.

District Court Procedural History

Reifert filed suit for damages under the Sherman Act in the U.S. District Court for the Western District of Wisconsin, claiming four years' coerced association fees as damages. He also sought injunctive relief. Jurisdiction was based on respondents' substantial impact on interstate commerce through four years of MLS activities: Sales of billions of dollars of real estate.

Reifert's major theory was that defendants had committed a tie-in violation, either as a *per se* violation, or a rule of reason violation.

Reifert asserted a *per se* claim was established by proof of five elements: (1) that RASCW had market power in the market for MLS services, that (2) there was a tie-in between MLS subscriptions and purchase of NAR trade association services,[1] (3) that NAR trade association services were a separate product

[1] Reifert asserted the per se violation occurred only as to NAR trade association services. Although three separate Realtor association products were forced (local, state, and national), he claimed a *per se* violation existed only as to NAR sales.

than MLS subscriptions, (4) that the tie caused a not-insubstantial impairment in the market for the tied product – trade association services sold to real estate agents and appraisers, and (5) that RASCW benefited from sales of the tied product.

Reifert asserted a rule of reason claim was established by proof of (1) an unreasonable restraint on competition in the market for trade association services, or (2) an unreasonable restraint on competition in real estate brokerage markets from NAR's no-contact rule. The parties filed cross-motions for summary judgment at the close of discovery.

To prove competition was impaired in the tied product market Reifert offered evidence of one dozen trade associations of residential real estate agents and/or appraisers which sold packages with similar features to the NAR package. One exhibit compared features of the thirteen trade association products:

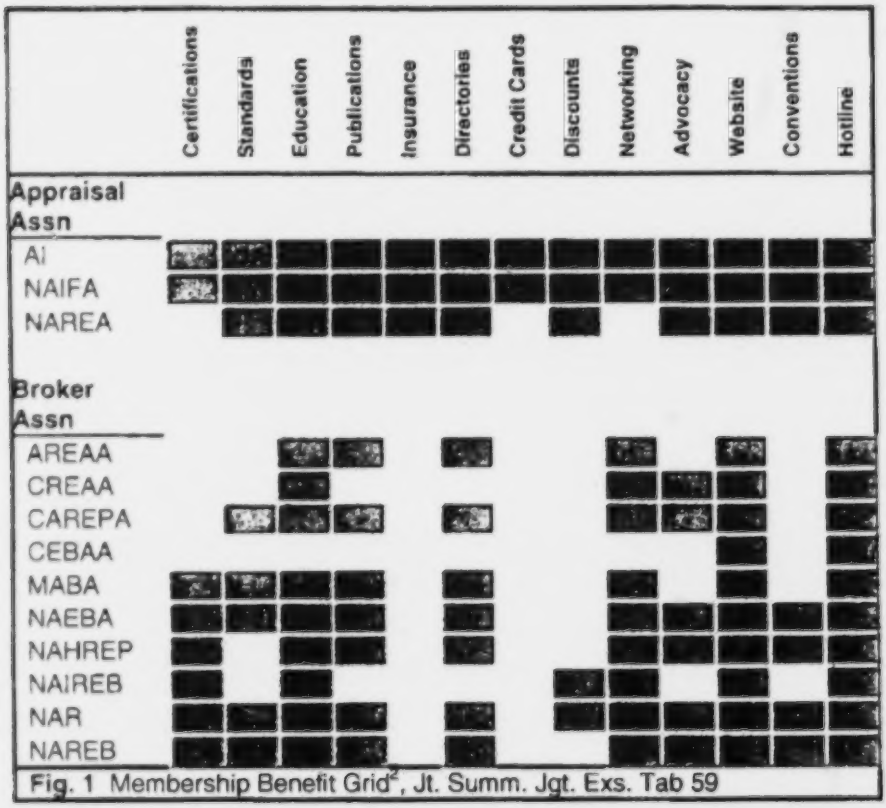

Fig. 1 Membership Benefit Grid[2], Jt. Summ. Jgt. Exs. Tab 59

A major defense of defendants was that NAR had no competition, i.e., none of the dozen trade associations offered by Reifert was in the same product market as NAR. The district court agreed, ruling that NAR had no competitors, and entered summary judgment for defendants.

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[2] Publications include software, newsletters, magazines, market information & statistics; Directories mean membership directories.

Seventh Circuit Procedural History

The Seventh Circuit held Reifert had proved: access to the MLS was a necessity for real estate agents and appraisers, and the information offered in the MLS was not available anywhere else. Virtually all active realty agents in the area subscribed to the MLS. Nearly every home was available in the MLS, giving it near-perfect market information. It is impossible to perform the tasks of a real estate agent or appraiser without the MLS. The court concluded that SCWMLS had sufficient market power to restrain trade.

The court also held Reifert proved trade association services (consisting of lobbying, social functions, courses, referral programs, contract forms, conventions, publications, and legal information) were separate from MLS subscription services (a database of properties that was searchable and filterable, detailed property information, compensation offerings, prior sales history, days on the market, and sale price of comparable homes).

Finally, the Seventh Circuit held Reifert had proved trade association services were tied to MLS services, i.e., that realty agents and appraisers could not purchase MLS services without purchasing trade association services from Realtor associations. Although SCWMLS did not require that MLS users purchase local Realtor association services from RASCW[3], a high percentage did so. SCWMLS did, however, require that all MLS users purchase national services from NAR.[4]

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[3] SCWMLS is the wholly owned subsidiary of RASCW.

[4] NAR does not sell services directly. They can only be purchased through one of NAR's 1,500 affiliated Realtor associations. When purchasing trade association services from a local Realtor association, a real estate agent is required also to purchase trade association services (Cont'd)

The Seventh Circuit did not rule whether Reifert's evidence proved RASCW had an economic interest in sales of the tied product, observing that this Court has never required such an element, although it had been required by the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits.

To meet the contention that NAR operated without competition, Reifert presented evidence in the district court that each indicia of *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) indicated that all twelve candidate trade associations were in the same product market as NAR. As part of his district court showing, Reifert also presented cross-price elasticity evidence demonstrating that NAR showed cross-elasticity with at least three of the candidate associations, including NAEBA.

The Seventh Circuit rejected all Reifert's evidence on market impairment because he did not provide an "economic analysis," which we take to be an opinion by an economist. App., at 14a-15a.

In addition, the Seventh Circuit held all dozen candidate trade associations could not compete with NAR as a matter of law. App., at 12a. We bold the reasons stated by the Seventh Circuit.

1. "**Serves a distinct ethnic community**." Rejecting the Asian Real Estate Agent Association, Chinese American Real Estate Professionals Association, Chinese Real Estate

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(Cont'd)

from the state Realtor association and NAR. In the event a person is located in one of the very few areas in the United States over which a local Realtor association has no jurisdiction, a real estate agent can buy trade association services from a state Realtor association, at which time she will be required also to purchase trade association services from NAR. Thus, Realtor association services are tied together, the legality of which is not challenged in this suit.

Association of America, National Association of Hispanic Real Estate Professionals, and National Association of Real Estate Brokers.

2. "**Covers only exclusive buyer agents**" Rejecting the Colorado Association of Exclusive Buyer Agents, Massachusetts Association of Exclusive Buyer Agents, and National Association of Exclusive Buyer Agents.

3. "**Serves only independent brokers**" Rejecting the National Association of Independent Real Estate Brokers.

4. "**Covers only appraisers**" Rejecting the Appraisal Institute, National Association of Independent Fee Appraisers, and National Association of Real Estate Appraisers.

The Seventh Circuit affirmed the district court's judgment for defendants.

Reasons for Granting the Petition

1. The Seventh Circuit's requirement of an "economic analysis" as a mandatory form of evidence departs from *Brown Shoe* and conflicts with the law of many circuits

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1952) lists indicia of when two products occupy the same market:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as

> industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

None of these factors is mandatory. The boundaries "*may* be determined. . . ." The outer boundaries are found by "reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes." Thus, in defining a market, the proponent must use *either* reasonable interchangeability evidence, or cross-price elasticity evidence. If interchangeability evidence is used, any or all of the seven indicia may be used; none are required.

Nothing in that simple formulary requires that such evidence be presented through an expert witness. Until now, there were no known circuit court decisions that rejected *Brown Shoe* proofs merely because they were not presented through the mouths of experts.

In the Eleventh Circuit, *Thompson v. Metropolitan. Multi-List, Inc.*, 934 F.2d 1566, 1570-71 (11th Cir. 1991) no expert opinion testimony was required to prove two realty trade associations occupied the same product market:

> The Empire Board competes with the Board of Realtors and offers similar services, including a code of ethics and arbitration. The Empire Board is a predominantly African American association which services a predominantly African American clientele. Most of its members are located on the south side of Atlanta and most of its members traditionally represent buyers. . . . Empire competes in the market for professional affiliation with the Realtors.

Fifty-six words of evidence summary established that Empire competed with the Realtor association. The ethnicities were different and the orientations were different (the Realtor association was of mixed orientation; Empire was buyer oriented) but the evidence established competition as a matter of law.

The Ninth Circuit held a disputed issue of market definition prevented summary judgment in *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir. 2001). No expert testimony was required to prove potential existence of a separate market for original equipment major brand vintage tires. The court relied on *Brown Shoe* indicia including testimony of industry participants, advertising material, and industry production data.

In *Foundation for Interior Design Education Research v. Savannah Collage of Art & Design*, 244 F.3d 521 (6th Cir. 2001) the Sixth Circuit had no trouble defining a market without expert opinion evidence. The district court opinion shows the dispositive evidence involved no expert opinion or "economic analysis."

> Savannah College admitted at oral argument that it was competing with accredited schools for the same pool of students, faculty, and staff. . . . Savannah College suggested that it was "severely crippled" in its ability to compete because of perceived differences by students, faculty, and staff in the quality of accredited versus non-accredited interior design programs. (Id.) However, "courts have repeatedly rejected efforts to define markets by price variances or ***product quality variances***. Such distinctions are meaningless where the differences are actually a spectrum of price and quality

> differences." *Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc. (In re Super Premium Ice Cream Distribution Antitrust Litig.)*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (emphasis added) (rejecting attempt by plaintiff to define the relevant market as "premium ice creams," because "all grades of ice creams compete with one another for customer preference" and "the relevant market is ice cream generally"). . . .

Foundation for Interior Design Educ. Research v. Savannah College of Art & Design, 73 F. Supp. 2d 829, 838 (W.D. Mich. 1999) [emphasis in original]

The Seventh Circuit expressly rejected this Court's teachings at pages 10a – 15a.

> Reifert employs a 30-year old decision from this Court, *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 308 (7th Cir. 1976). . . . While the "practical indicia" named in *Brown Shoe* and *Beatrice Foods Co.* are important considerations in defining a market, they were never intended to exclude economic analysis altogether. . . . This Court has emphasized the use of economic analysis in the law. To demonstrate competition in an antitrust case, the plaintiff *must provide an economic analysis of the relevant market*. . . . Lacking any economic evidence, Reifert has failed to show that the tying arrangement has foreclosed any portion of the market for real estate services. [App. 14a-15a, emphasis added.]

The Seventh Circuit switched its standards in a single page. In the quoted section, the court started by correctly noting the primacy of *Brown Shoe*. ("While the 'practical indicia' named in *Brown Shoe* . . . are important considerations. . . ."). It

followed with a correct observation ([the *Brown Shoe* practical indicia] "were never intended to exclude economic analysis altogether. . . ."), and a generalization ("This Court has emphasized. . . ."). Then it added a new requirement not present in any Supreme Court decision or in any other circuit: "To demonstrate competition in an antitrust case, the plaintiff *must provide an economic analysis of the relevant market.*" [emphasis added.]

Reifert presented evidence meeting the requirements of *Brown Shoe*, involving both substitution evidence and cross-price elasticity evidence. All was rejected because it was presented directly, rather than second-hand through an expert report. This Court should grant the petition for certiorari to correct the error of law by the Seventh Circuit in its departure from this Court's law and the law of other circuits.

2. The Seventh Circuit's rejection of candidate firms from the market based on racial or ethnic interests, sales standards, sales volumes, and product distinctions, violates the law of this Court and conflicts with many circuits

A tie-in violation requires proof of adverse impact in the tied product market. Such proof requires there be least one firm other than the tied product seller in that market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984). In an early MLS-Realtor tie-in case, plaintiff's failure to offer even one candidate as a rival to the local Realtor association in the tied product market was fatal to the claim. *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir. 1988). In *Thompson*, another MLS-Realtor tie-in case, the plaintiffs

showed there were two competitors in the tied product market, satisfying the adverse impact element of the claim.[5]

Reifert defines sellers in the tied product market as regional or national firms selling trade association services to residential agents and appraisers.[6,7] He defines the buyers in that market as all residential realty agents and appraisers in the United States. It is undisputed NAR is a seller in that market selling to one million buyers, consisting of realty agents and appraisers.

Reifert offered twelve candidates as competitors to NAR in that tied product market. The district court and the Seventh Circuit rejected every candidate on grounds that violate the established law of this Court and many circuits.

Racial/ethnic differences

The Seventh Circuit rejected five candidate firms because they "serve[d] a distinct ethnic community." App. 12a. There was no evidence in the record to support the Seventh Circuit's

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[5] A second part to the adverse impact test is that a not-insubstantial volume of interstate commerce be affected by the tie-in. *Jefferson Parish*, *Id.* Reifert proved $167,959-$335,918 of involuntary dues was sent interstate by defendants to NAR in the relevant period. Reifert also showed millions of dollars of lost subscription dues to rival associations. Sect. 5D, below.

[6] This relationship is sometimes referred to as selling "memberships." Because memberships can be created without financial transactions in other contexts (i.e., being a member of a family, political party, or religious group), we believe use of the term "membership" is ambiguous and misleading, and should be avoided in the analysis of cases involving sale of trade association services.

[7] Because MLS users must buy three trade association services from separate Realtor associations at three levels, there are actually three tied products. In this case, Reifert utilizes only one tied product seller: NAR.

statement, so it must have judicially noticed a universally recognized fact. If the Seventh Circuit was right, this Court should say so and provide guidance as to many subsidiary questions.

The trade association being compared to was the National Association of Realtors, whose racial and ethnic makeup was not part of the record. The Seventh Circuit opinion only makes sense by reading NAR as Caucasian. That said, one can read the Seventh Circuit opinion as holding that Asian trade associations do not compete with Caucasian trade associations as a matter of law, even if all *Brown Shoe* indicators are present, and even if the Asian trade association offers better services at a lower price.

Does this rule of law collapse if NAR has a single Asian member? Is it no longer a Caucasian trade association? How many Asian members of NAR would it take before the Seventh Circuit rule falls apart? As a matter of law, should a trade association be typed by the *majority* ethnicity of its members? If so, is the Seventh Circuit rule still true? Does firm A with 55% Caucasians and 45% African-Americans as customers not compete with firm B whose customers' ethnicities are reversed?

How much Asian blood makes one Asian? What does mixed parentage do to the Seventh Circuit's classification of firms? How do we score a customer who is half-black, half-white? Will the law re-adopt long-despised words such as "octoroon" and "half-breed?"

In fact, none of the five "minority" trade associations required members to be of non-Caucasian ancestry. They sell services to persons of *all* races and ethnicities. The National Association of Real Estate Brokers, known as NAREB, testified at deposition through its president, Ronald Branch, who is also a member of NAR. Nothing in the record indicates the racial or

ethnic composition of NAREB. Mr. Branch was asked to estimate the racial/ethnic composition of NAREB but he was unable to do so. He stated NAREB was open to people of all ethnicities. What disqualified NAREB in the eyes of the Seventh Circuit was not its racial composition – since it was unknown – but its support for minority members in real estate. The Seventh Circuit's opinion shows a diligent study of the record so it must know that fact. For the Seventh Circuit's opinion to make any sense, it must have assumed NAR does not support minority members in real estate. Nothing in the record supports such assumption. Thus fleshed out, we read the Seventh Circuit opinion as holding that trade associations that support minority members in real estate do not compete with trade associations that do not support minority members in real estate. Are all these facts true as a matter of law?

Differing customer requirements

The Seventh Circuit rejected three trade associations as potential competitors of NAR because they "Cover[ed] only exclusive buyer agents." App. 12a. NAR also has exclusive buyer agents as customers. Andrew Show, the president of the National Association of Exclusive Buyer Agents ("NAEBA") estimated 90% of NAEBA members were NAR members. He also testified NAEBA recruited new members from NAR conventions. Thus, in making its ruling, the Seventh Circuit had in mind the undisputed fact that both NAR and NAEBA sold to the same pool of buyers: real estate agents representing only buyers.[8] The Seventh Circuit held as a matter of law the three exclusive buyer associations could not compete with NAR because the three sold *only* to agents agreeing to represent just buyers, while NAR sold to *any* real estate agent.

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[8] Many agents claim to be buyer specialists. An exclusive buyer agent represents buyers and never represents sellers.

In *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991) the question was the same as here: whether an MLS tie-in caused adverse impacts in the tied product market of trade associations selling to real estate agents. The favored trade association was a Realtor association with no buyer-seller orientation. The disadvantaged trade association was predominantly African-American; its customers mainly represented buyers. The Eleventh Circuit found they competed in the same market as a matter of law.

Reifert made the same showing as in *Thompson*. The handling of the question by the Seventh Circuit directly conflicts with the Eleventh Circuit's.

Product differences

The Seventh Circuit rejected the National Association of Independent Real Estate Brokers ("NAIREB") as a candidate competitor to NAR because it "serves only independent brokers." App. 12a. We read the statement as meaning that NAIREB sells only to independent brokers and NAR sells to independent brokers and other types of brokers. Thus, both NAIREB an NAR compete for the business of independent brokers.

Smaller number of buyers

The Seventh Circuit rejected three appraiser trade associations as potential competitors of NAR because they "Cover[ed] only appraisers." App. 12a. NAREB also sells association services to appraisers. Thus, NAR, NAREB, and the three appraiser associations compete for the business of appraisers.

In The Seventh Circuit departed from *Brown Shoe* in a fundamental way. One of the *Brown Shoe* indicia is whether firms have "distinct customers." As interpreted by many circuits,

that phrase means if two firms compete for the same pool of customers it tends to prove they are in the same market. The Venn diagrams at Fig. 2 make this clear. The diagrams shows two firms, large yellow firm A and smaller blue firm B. In 2A and 2B, there are customers that both firms (yellow and blue) sell to, which constitutes evidence A and B are in the same market. In 2C, there are no customers in common, tending to prove A and B are in different markets.

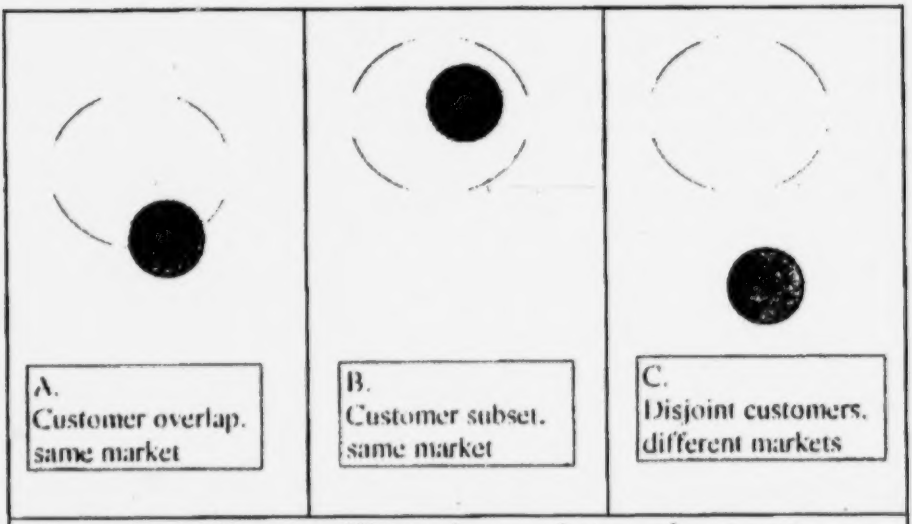

Fig. 2: Venn diagrams illustrating market overlap or not.

Defendants claim because NAR sells its product to a non-identical group of customers than the dozen firms offered by Reifert, NAR's market is therefore different than the markets of those dozen other firms. However, the crucial observation is that NAR sells the same trade association services for the same price to African-American agents, Asian agents, Hispanic agents, exclusive buyer agents, and appraisers, just as the twelve candidate associations do.

The circuits uniformly view overlapping customers as evidence of being in the same market. Third Circuit: *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997) (rejecting plaintiff's attempt to define market as pizza suppliers approved by Domino's for its franchisees since wider market of all pizza operators were customers of wider group of suppliers; Sixth Circuit: *Smith v. Multi-Flow Dispensers, Inc.*, 1999 U.S. App. LEXIS 9845 (6th Cir. 1999) (Supplying same product to different customer groups tends to prove customer groups are part of one market); Eleventh Circuit: *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 824 (11th Cir. 1991) ("While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to those customers.").

Overlapping customers does not force a conclusion that the products are in the same market. In *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966) the customers were the same: firms seeking some form of security services for their premises. The decisive factor that made central station services a separate market was that none of the candidate substitutes (such as watchman services) "appears to operate on the same level as the central station service so as to meet the interchangeability test of the *duPont* case." As the Tenth Circuit held in *Telcor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1132 (10th Cir. 2002), "Many courts have addressed the

situation where two or more products or services have similar functions but different physical characteristics. These cases make clear that the relevant inquiry remains whether the differences in type render the products poor substitutes. . . ."

Thus, the Seventh Circuit departed from the fundamental legal principles of this Court and other circuits by: (1) focusing on the degree to which the buyer populations of the thirteen firms differed, when it should have focused on the amount of overlap; (2) rejecting the dozen trade associations as candidates after finding insufficient buyer overlap, when it should have evaluated *all* the *Brown Shoe* factors; (3) not evaluating the evidence that the thirteen trade association service products were good substitutes, and (4) not evaluating Reifert's evidence of cross-price elasticity between NAR products and those of other associations.

3. The Seventh Circuit's resolution of the disputed market definition issue conflicted with the law of most circuits that such questions are factual, presenting a triable issue, presenting a matter not decided by this Court

The circuits have held that market definition is a question of fact for the jury. *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (1st Cir. 1996); *Weiss v. York Hospital*, 745 F.2d 786, 825 (3d Cir. 1984); *Thompson*, 934 F.2d at 1573-74 (11th Circuit 1991).

In contrast, the Seventh Circuit opinion appears to treat the question as one for the court to resolve. App., at 12a-15a. Reifert submits that at a minimum, he provided sufficient evidence to support a finding that there is a national market in which the buyers are residential realty agents and appraisers, the sellers are national and regional trade associations, and the product being sold is the package of services presented in Figure 1, above. Three circuits describe

the burden of proving competitors in the tied product market as "minimal" or "modest." *Wells* ("the plaintiff must make some minimal showing of real or potential foreclosed commerce caused by the tie, if only as a matter of practical inferential common sense," 850 F.2d 803, 815, fn. 11); *Osborne v. Sinclair Refining Co.*, 286 F.2d 832, 841 (4th Cir. 1960) ("modest showing"); *Thompson*, 934 F.2d at 1570-1571. It was not incumbent on Reifert to demonstrate the outer bounds of the tied product market.

We have found no ruling by this Court on the question of whether market definition is for the court or the jury. Thus, it appears to be one of first impression. The Court should grant certiorari to answer this important question, and decide whether Reifert met his minimum burden, and if so, whether he established at least two competitors in that market.

4. In ruling NAR's no-contact rule was reasonable, the Seventh Circuit departed from this Court's ruling in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978)

Under *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), it is a Sherman Act violation for competitors to enact "ethical" rules that prohibit competition. NAR's non-solicitation rule prohibits Realtor association members from contacting sellers who have listed their properties with other Realtors. The rule prohibits agents from seeking to represent sellers when buying another property. It takes away from rookie agents one of the most potent tools they would otherwise have to compete with established agents. The rule stifles competition.

Reifert's desire to send targeted mail to real estate sellers with listings with other realty agents is legal under Wisconsin law, which recognizes the right to compete. Competition benefits

both competitors and consumers. *Landess v. Borden, Inc.*, 667 F.2d 628 (7th Cir. 1981) (applying Wisconsin law). Defendants' MLS tie-in strips MLS users of their right to compete, because when they are forced to buy a Realtor membership, one of the trade association "benefits" is enforcement of NAR's code of ethics, which prohibits competition under the non-solicitation rule.

Professional Engineers sustained a facial attack; this Court did not require the plaintiff to set forth evidence of harm to competition, since the rule itself was a "frontal assault" on the policy of competition under the Sherman Act.

In deposition testimony, NAR expressly acknowledged that agents such as Reifert were prohibited from contacting sellers, even though no listing contracts would be violated. NAR further acknowledged it had no factual basis whatsoever to justify its complete prohibition of such competition. That is, NAR had no facts to establish even the slightest procompetitive benefit from the prohibition. The penalties for violating the non-solicitation rule are fines up to $5,000 and MLS suspension up to three years.

The lower court noted that Reifert and other agents can make "general announcements" for their services. Reifert seeks to send *targeted* messages to sellers, something expressly prohibited by the rules. The lower court misapplied *Professional Engineers* by failing to recognize that Reifert met his burden of showing the plainly anticompetitive effects of the outright prohibition of contacting sellers who had signed listing contracts with others. Reifert met the burden by showing that (1) he specialized in assisting buyers and never represented sellers; (2) his business would be best promoted by targeted mailings to sellers, nearly all of whom were buyers; (3) general mailings (i.e., everyone in a given geographic area) would be wasteful, since nearly all the messages would go to people who were not

in the market; (4) his messages would never have the effect of interfering with a listing contract between a seller and a real estate agent, since Reifert never took such listings; and (5) NAR acknowledged it had no facts showing any procompetitive effects of the rule.

The Seventh Circuit held at 17a-18a that the rule was saved because "if agents were reluctant to post their listings, for fear that other agents would steal their clients, the market would become less transparent and less efficient." There are several flaws with that rationale: (1) there was no evidence that even one agent would refrain from listing a property for fear of such theft; (2) owners demand to have their properties publicized through MLS listings and there was no evidence that such demands would be overcome by the hypothesized trepidations; (3) the cited rules of Alaska and Massachusetts (non-NAR regimes) were far narrower, allowing more competition by agents, proving MLSs will function with less restrictive rules; (4) the notion of "theft of a client" is wholly at odds with vigorous competition, where the person being "stolen" has no contract with any agent to represent them as a buyer, and finds the soliciting agent a better choice; and (5) Wisconsin already has laws protecting contracts, and for NAR and RASCW to add its own layer of anti-competitive restraints burdens competition with no pro-competitive benefits. *See*, *Landess v. Borden, Inc.*, 667 F.2d 628 (7th Cir. 1981) (holding Wisconsin law favors vigorous competition, no contract violated by competitive tactics of one litigant).

Wisconsin gave Reifert the right to compete vigorously when it issued him a broker's license. Defendants took that right away.

5. Other issues support certiorari

A. The Circuits are requesting guidance The Seventh Circuit opinion stated, "Economics, like other social sciences, has its share of counterintuitive findings, so observing things that to the untutored eye seem to be substitutes need not mean that they *are* good substitutes." App., at 11a [internal quotations omitted].[9] The First and Tenth Circuits have observed, "There is no subject in antitrust more confusing than market definition." *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 597 (1st Cir. 1993); *Telecor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1131 (10th Cir. 2002).

It would be appropriate for this Court to provide additional guidance to the circuits on market definition principles. This case offers a useful vehicle.

B. Reifert represents hundreds of thousands of others forced to purchase unwanted NAR services Reifert's record evidence was that MLS-Realtor tie-ins cover 84% of the 100 top US markets. In the remaining 16% of the markets, realty agents and appraisers have a choice whether to buy trade association services from NAR. Depositions in Massachusetts and Alaska, where statewide MLSs do not force purchase of NAR trade association services, establish that 30% of those MLS users do not purchase the NAR package. When projected over the one million NAR members, that figure indicates that over 250,000 realty agents and appraisers are coerced into buying the NAR package.

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[9] We read the statement as acknowledging that Reifert's evidence tended to prove that the trade association service products of the thirteen firms "seem to be substitutes" and the Seventh Circuit's ruling was "counterintuitive."

C. NAR dominates the trade association market but did not earn its prominence Reifert's record evidence shows NAR holds a 97% market share of the realty agent trade association market and 65% of the appraiser trade association market.[10] NAR didn't get there the honest way – through skill, foresight, and industry – but through forcing sales through MLS tie-ins.

D. Rival trade associations lose sales due to tie-ins Reifert obtained sales data for five of the twelve trade associations. His record evidence groups sales rates for these associations in the closed vs. open MLSs[11] in the top 100 markets. Comparing sales rates creates a cross-price elasticity study. In the closed MLSs, 30% of realty agents/appraisers perceive the price of the NAR package to be free, since it's an undesired add-on to the combined price paid for the tying product: MLS. In moving to open MLSs, realty agents/appraisers perceive the NAR package at its true price, since it's offered separately. Thus, in the open MLS markets realty agents and appraisers perceive the NAR package are relatively more expensive than perceived in closed MLS markets. If there were cross-price elasticity, one would expect that sales rates of some of the five associations to rise in open MLS regions as compared to closed MLS regions.

Reifert's record evidence collected such data, presented and reformatted in Figure 3. The sales rates for all five associations are normalized at 100% in the closed MLS regions. The results show that four associations experience higher sales rates, and

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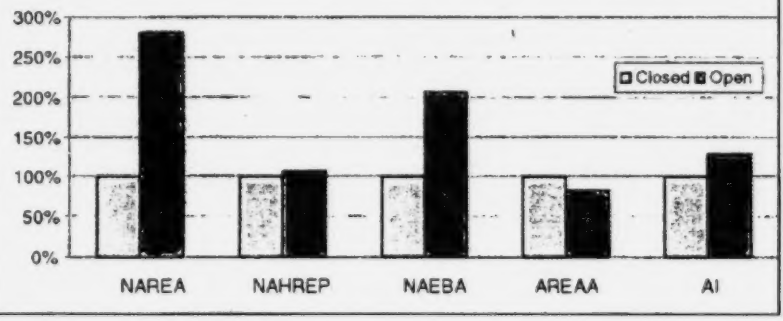
[10] As indicated above, it is possible the market for trade association services for realty agents and the trade association market for appraisers are a single market. Further work would be required to determine whether they are separate markets or the same. However, nothing in this case rides on whether it's one market or two.

[11] A closed MLS is one that requires purchase of the NAR trade association package; an open MLS does not.

one association shows lower rates, in open as compared to closed MLSs. Two of the results are too close to judge without expert analysis, which Reifert did not present. One association (Appraisal Institute) showed sales rates 25% higher in open MLS regions as compared to closed MLS regions. The remaining two association results are whoppers. Reifert's association, NAEBA, has twice the sales in open regions as compared to closed regions. The result for the National Association of Real Estate Appraisers is off the charts, so to speak. Its sales rate in open MLSs is more than 2.5 times its sales rate in closed MLSs. These results are easy to interpret without the need for economic analysis. They indicate NAEBA, NAREA, and AI show cross-price elasticity, proving they compete with NAR.

Fig. 3 Percent Association Membership in Open vs. Closed MLSs



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Record evidence established NAREA sells about 5,000 memberships per year at $215 each, which is about $1 million per year. That occurs in a nation where 84% of MLS markets are closed. The data in Fig. 3 indicate the sales by NAREA would be millions of dollars higher if MLSs were open. Sales increases by NAEBA and AI would also be substantial. Reifert easily demonstrated a not-insubstantial diversion of trade association revenues away from NAR's rivals.

Cross-price elasticity data shows that the services offered by at least three of the twelve are not being sold to as many realty agents and appraisers as would occur without the tie-in. The MLS-Realtor tie-in substantially lowers output for at least three trade associations.

E. Competition is suppressed in the $60 billion residential real estate brokerage market The Government Accountability Office report to the House of Representatives, *Real Estate Brokerage – Factors That May Affect Competition*, of August, 2005, concluded there was a lack of price competition between real estate brokers.[12] "One potential cause of the industry's apparent lack of price variation is the use of multiple listing services (MLS), which facilitates cooperation among brokers in a way that can benefit consumers but may also discourage participating brokers from deviating from conventional commission rates." p. 2 of 32. As described in the report, there is a new breed of realty agents in the market place that offers rebates to buyers who purchase a home through them. It works thus: the buyer purchases a home through such a buyer agent. The buyer agent typically receives half the commission paid by the seller to the seller's agent. The buyer agent then rebates part of the commission received to the buyer. Rebates can be many

[12] GAO.gov/new.items/d05947.pdf, last visited Dec. 7, 2006.

thousands of dollars. Such buyer agents present effective price competition in the marketplace.

At any given time, only about 5% of potential home buyers are looking to buy a home. The other 95% already have homes and don't plan to move. Thus, it would be desirable from a buyer agent perspective to spend marketing time and money on the 5% who are in the market. That 5% in the market to buy a home is nearly congruent with the pool of people selling a home – nearly all of whom list the home in the MLS. Thus, a buyer agent would ordinarily want to send buyer-oriented literature to sellers in the MLS as the most efficient use of marketing resources. This is prohibited by NAR rules, effectively enforced on Reifert since he's forced to adhere to NAR's rules as part of the MLS tie-in.

The Seventh Circuit acknowledged NAR's rule, as imposed by RASCW, prohibits Reifert from contacting sellers to offer buyer-oriented services. The heart of the Seventh Circuit's reasoning is the handshake rule: the first to shake the prospect's hand owns the prospect. Every state, including Wisconsin, has a body of law prohibiting people from inducing others to breach their contracts, or interfering with an advantageous business relationship. Thus, agents using the MLS are already fully protected from the potential that Reifert will steal their customers, as Wisconsin defines such theft. The handshake rule is far more restrictive than Wisconsin law.

NAR has created its own body of rules prohibiting competition across the United States that goes much farther than any state law. The rules are enforced in secret prosecutorial sessions leading up to expulsion from the MLS if a violation is found. Early in his career, Reifert violated the rule, was fined, and he has not violated the rule since. But he would like to.

The substantial question for this Court is whether the handshake rule should be federal antitrust law. The GAO report concluded that price competition across the U.S. is absent. This case forcefully explains why such competition is absent in half of all real estate transactions – the half relating to buyer services.

Related questions: Should review of NAR's rule be facial, as in *Professional Engineers*? Or deferential, as the Seventh Circuit held.

The record evidence also explains how NAR's no-contact rule interferes with the *other* half of all real estate transactions, relating to the sell-side. Under the no-contact rule, if a listing is about to expire, all real estate agents are prohibited from sending letters to the seller advising that, since the house didn't sell in the initial listing period, they might want to list with a low commission agent so as to be able to effectively lower the price of the home without losing any of the net sale proceeds. Such price competition would be fully consistent with the Sherman Act's goals.

The prohibited contact would interfere with no listing contract since it would propose to take effect *after the first listing expires by its terms.*

In record testimony, NAR admitted it was unaware of any harms avoided by the no-contact rule.

This case presents the Court with: An authoritative government report concluding there is an absence of price competition in the real estate brokerage industry, with total commissions of $61 billion paid in 2004 (GAO report, pg. 1); (2) NAR rules enforced nation-wide inhibiting competition on both the buy-side and sell-side of transactions; (3) that are enforced involuntarily through MLS tie-ins on over 250,000 realty agents, and voluntarily assumed by another 750,000 (yes – many agents approve of lack of price competition, but

consumers do not); and (4) a petitioner who is restrained by respondents' and NAR's rules from competing in ways that are legal under state law.

In short, Reifert has the answer to why real estate commissions are not competitive. The Seventh Circuit shrugged off the answer, but this Court should not.

F. NAR's MLS restraints challenged by the United States Two weeks before the filing of this petition the United States district court for the Northern District of Illinois filed its memorandum order denying NAR's motion to dismiss the government's case against it for national restraints relating to MLS practices. *United States v. National Assn. of Realtors*, 2006 U.S. Dist. LEXIS 86963 (N.D. Ill. Nov. 27, 2006). The government claims "NAR and its members have adopted policies and by-laws (that is, the two VOW policies), enforced by sanctions for non-compliance, that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers." *Id.* at *37 (internal quotations omitted).

In *US v. NAR* the MLS is central to creation and use of data that may be displayed through VOWs (virtual office websites). Reifert's case does not depend on the outcome of *US v. NAR*. However, the restraints alleged in *US v. NAR*, and NAR's insistence on enforcing those restraints, show the restraints alleged here are a substantial part of a national campaign by NAR to reduce competition in the brokerage market.

G. This case is controlling rulings across America The Sixth Circuit affirmed summary judgment for a Realtor association in a parallel NAR-MLS tie-in case, *Buyer's Corner Realty, Inc. v. Northern Kentucky Assn. of Realtors*, 2006 U.S. App. LEXIS 25157 (6th Cir. 2006). The Sixth Circuit issued a panel decision adopting the district court opinion in *Buyer's*

Corner Realty, Inc. v. Northern Kentucky Assn. of Realtors, 410 F.Supp.2d 574 (E.D. Ky. 2006), which relied primarily on the district court decision in this case.

Likewise, the federal district court in Spokane, Washington was influenced by this case in entering summary judgment for defendants in an MLS tie-in case. "Plaintiffs have failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement." *Id.* at *8. *Prencipe v. Spokane Bd. of Realtors*, 2006 U.S. Dist. LEXIS 29828 (E.D. Wa. 2006), at *8.

Nine federal judges have now ruled that trade associations of realty agents interested in supporting the interests of Asians, Hispanics, African-Americans, and other minorities, must be excluded as competitors of NAR for skin color reasons.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 12, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-3601

JAY REIFERT,

Plaintiff-Appellant,

v.

SOUTH CENTRAL WISCONSIN MLS CORPORATION, REALTORS ASSOCIATION OF SOUTH CENTRAL WISCONSIN, INC., ROBERT L. COURTER, SUSAN MATTHEWS, DAVID STARK, ROBERT WEBER, THOMAS BUNBURY, MAURICE W. HILL, PETER SVEUM, MARSHALL ZWYGART, and DAVID MCGRATH,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin,
Case No. 04-C-0969-S—John C. Shabaz, *Judge*

ARGUED FEBRUARY 17, 2006—DECIDED June 12, 2006

Before FLAUM, *Chief Judge*, and KANNE and WOOD, Circuit Judges.

Appendix A

FLAUM, Chief Judge. Plaintiff-Appellant Jay Reifert claims that the defendants violated the Sherman Act by tying access to a real estate multi-listing service ("MLS") to membership in a Realtors Association. The district court granted summary judgment for all defendants in this case, finding no competition in the tied market and therefore, no antitrust violation.

For the following reasons, we now affirm the judgment of the district court.

I. Background

Realtors Association of South Central Wisconsin, Inc. ("RASCW") is a real estate trade association. Its members are real estate agents and appraisers in and around Madison, Wisconsin. RASCW offers a variety of products and services to its members, including lobbying, social functions, courses, referral programs, contract forms, conventions, publications, and legal information.

RASCW is associated with the Wisconsin Realtors Association and the National Association of Realtors ("NAR"). When a person pays membership dues to an association affiliated with NAR, that person becomes a member of NAR. Normally, Realtors Association[1] memberships are packaged as a group including local, state, and NAR memberships.

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1. "Realtors Associations" are organizations affiliated with the National Association of Realtors and have agreed to abide by the NAR Code of Ethics. RASCW is an example of a local Realtors Association.

Appendix A

RASCW owns 100% of the stock in the South Central Wisconsin MLS Corp. ("SCWMLS"). The MLS or multiple listing service is a computerized database of homes and properties listed for sale by SCWMLS participants in south-central Wisconsin. Access to this multiple listing service is a necessity for real estate agents and appraisers in this area. Virtually all active residential real estate agents in the region subscribe to SCWMLS. Users are charged a quarterly fee to gain access to the full database and must be a member of a Realtors Association affiliated with NAR. The Realtors Association membership requirement has existed for more than fifty years. Generally, any licensed real estate professional who agrees to abide by the NAR Code of Ethics and pays the applicable fees is admitted.

Article 16 of NAR's Code of Ethics contains a "non-solicitation" rule. This article and the related standards of practice prohibit members from inducing sellers to breach listing contracts, advising sellers of superior services or prices during the time they are under contract with another Realtor, and using "information received through a Multiple Listing Service . . . to target clients of other Realtors®."

A member-elected board of directors sets dues for RASCW. Fees for SCWMLS are also set by members elected to a board of directors. Both organizations set their fees solely to cover operational costs, with no profit-making intent. Annual dues to join the NAR, Wisconsin Association of Realtors, and RASCW are approximately $449 a year.

The plaintiff, Jay Reifert, brings three claims against SCWMLS, RASCW, and the directors of SCWMLS. First, he alleges that SCWMLS unlawfully ties its services to

RASCW. Second, Reifert alleges that by conditioning access to MLS service on membership in RASCW, an unlawful group boycott has occurred. Finally, Reifert alleges that Article 16 of the NAR Code of Ethics violates the Section I of the Sherman Act, 15 U.S.C. § 1, by prohibiting competition.

Reifert, is a residential real estate broker, exclusively representing buyers of real estate in south central Wisconsin. Reifert has been a member of RASCW (or its predecessor) and a participant in SCWMLS (or its predecessor) since 1988. Reifert belongs to the National Association of Exclusive Buyer's Agents ("NAEBA") and has no desire to maintain membership in RASCW or the state and national Association of Realtors. Reifert objects to the fees he is forced to pay for unwanted services and the Code of Ethics he must follow to maintain his membership in RASCW and NAR.

Reifert claims that during the four years at issue in this action, he has paid dues in excess of $2000 for an unwanted RASCW membership to maintain his SCWMLS access. During the relevant four-year period, there have been approximately 2,079 annual and 5,600 total SCWMLS participants.

To support an antitrust action, a plaintiff must demonstrate that the defendant's actions have restrained competition. Section I of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1. The Supreme Court has long recognized that Congress

intended to outlaw only "unreasonable restraints," not all contracts in restraint of trade. *See State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (citations omitted). The Clayton Act allows for private suits by individuals injured by violations of antitrust laws. *See* 15 U.S.C. §§ 15, 26.

On August 25, 2005, the district court granted summary judgment to the defendants and denied summary judgment to the plaintiff. A tying arrangement violates federal antitrust statutes if it has a substantial effect on interstate commerce. The district court found that "there is insufficient evidence for a fact finder to find that a tie between the defendant's multiple listing service and Realtor membership has had an effect on interstate commerce as that element has been defined by the Supreme Court."

As to Reifert's group boycott claim, the district court again found that the plaintiff had failed to prove any anticompetitive effects resulting from the tying of Realtors Association memberships to MLS services. Accordingly, the district court granted summary judgment to the defendants.

II. Discussion

We review a district court's grant of summary judgment de novo, taking all facts in the light most favorable to the non-moving party. *See, e.g., McCoy v. Harrison,* 341 F.3d 600, 604 (7th Cir.2003) (citations omitted). An award of summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A. Tying Claim

Reifert claims that the defendants have engaged in an unlawful tying arrangement by limiting SCWMLS access to members of a Relators Association. Thus, the alleged "tying product" is SCWMLS and the alleged "tied product" is membership in a Realtors Association.

In determining whether a violation of Section I of the Sherman Act, 15 U.S.C. § 1, has occurred as a result of a tie between two products or services, this Court requires the plaintiff to prove four elements. *See Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.,* 758 F.2d 203, 208 (7th Cir.1985) (citing imposition of the "economic interest requirement . . . by courts in the Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits").

> In order to establish the per se illegality of a tying arrangement, a plaintiff must show that: (1) the tying arrangement is between two distinct products or services, (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product, and (3) a not insubstantial amount of interstate commerce is affected. [*N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 5-6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)]; *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207, 1212 (9th

> Cir.1977). In addition, this circuit has held that an illegal tying arrangement will not be found where the alleged tying company has absolutely no economic interest in the sales of the tied seller, whose products are favored by the tie-in. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir.1978), *cert. denied*, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979); *Warner Mgmt. Consultants, Inc. v. Data Gen. Corp.*, 545 F.Supp. 956, 967 (N.D.Ill.1982).

Id. at 207-08.

Following this precedent, the district court correctly required Reifert to prove the following four elements of a tying violation: (1) a tie exists between two separate products; (2) the tying seller (SCWMLS) has sufficient economic power in the tying product market to restrain free competition in the tied product market (Realtors Association memberships); (3) the tie affects a not-insubstantial amount of interstate commerce in the tied product (Realtors Association memberships); and (4) the tying seller (SCWMLS) has some economic interest in the sales of the tied product (Realtors Association memberships). *Id.* at 207.[2]

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2. We agree with our concurring colleague that a cautious approach is always appropriate when anticipating future Supreme Court actions. In 1985, our Circuit began to incorporate the rule of reason in our tying analysis. At that time, we stated that, "According to the Supreme Court, a plaintiff's failure to state a *per se* illegal antitrust claim does not necessarily prove fatal to his case if he can state a claim under the rule of reason." *Carl Sandburg Vill. Condo.*

(Cont'd)

Appendix A

There is no question that Reifert has satisfied the requirements for the first two elements. First, access to the multi-listing service cannot be obtained without purchasing the tied product, a Realtors Association membership. Second, SCWMLS has sufficient market power to restrain free competition in the tied product market.

SCWMLS is a unique product. Nearly every available home in the relevant geographic area is listed on the service. The near-perfect market information created by SCWMLS is the result of a requirement that members place all listings in the MLS within five days. The MLS allows individuals with access to search and filter properties based upon detailed

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(Cont'd)

Ass'n No. 1, 758 F.2d 203, 210 (7th Cir.1985) (citing *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 499-500, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); *Warner Mgmt. Consultants, Inc. v. Data Gen. Corp.*, 545 F.Supp. 956, 966 (N.D.Ill.1982)); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) (O'Connor, J., concurring) ("The time has therefore come to abandon the ' *per se* ' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."). In a related area, the Supreme Court recently adopted Justice O'Connor's reasoning in *Jefferson Parish Hosp. Dist. No. 2* and held that tying arrangements involving patents should be evaluated based upon their market power "rather than under the per se rule." *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, __ U.S. __, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006). Although the *per se* analysis of the *Jefferson Parish Hosp. Dist. No. 2* majority has not been expressly overruled, in the intervening twenty-one years since *Carl Sandburg Vill. Condo. Ass'n No. 1*, the Supreme Court has not found occasion to disagree with this Circuit's approach.

criteria including compensation offered to buyers' agents, detailed property information, neighborhood information, prior sales history, offers made on the property, days on the market, and the sale price of comparable homes. The features and information available through SCWMLS are not available through any other service. In addition, the MLS service targets a different audience-real estate agents and appraisers-than free listing services or newspapers. In short, it is impossible to perform the tasks of a real estate agent or appraiser in the relevant geographic area without using SCWMLS. Thus, it possesses sufficient market power to restrain competition.

The third element of the *Sandburg* test states that a tying arrangement violates antitrust law only if "a substantial volume of commerce is foreclosed" because of the tie. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 16, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). This element can be broken into two sub-questions: (1) Is there at least one competitor in the tied product market other than the favored seller; and (2) Is the quantity of interstate commerce affected not-insubstantial?

The district court found no competition in the allegedly tied market for Realtors Association memberships. Where there is no competition in the tied market, there can be no antitrust violation. Forcing a buyer to purchase a product he otherwise would not have purchased is insufficient to establish the foreclosure of competition. *Id.* ("[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition

because no portion of the market which would otherwise have been available to other sellers has been foreclosed.").

Despite Reifert's desire to avoid purchasing a Realtors Association membership, without evidence of competitors in the market for services offered by the Realtors Association, there can be no foreclosure of competition. *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir.1978); 9 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1723a (2d ed. 2004) ("When there are no rival sellers of the tied product to be foreclosed, then the alleged tie-in might affect a substantial volume of commerce in the tied product and yet not foreclose anyone."). The district court correctly found that despite the "laundry list of entities" submitted by the plaintiff, there were no competitors in the tied product market.

Products and services are in the same market when they are good substitutes for one another. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

This Court requires that a plaintiff prove that products are good substitutes using economic evidence; a conclusory assumption of competition where products or services appear to be similar is insufficient. *See Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir.2004). Actual data and a reasonable analysis are necessary to demonstrate that a product or service is a good substitute for another.

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"Economics, like the other social sciences, has its share of counterintuitive findings, so observing things that to the untutored eye seem to be substitutes need not mean that they *are* good substitutes." *Id.*

Other federal courts have held that conditioning access to a multi-listing service on membership in a Realtors Association is not indicative of an unlawful tying arrangement. *See Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors,* 850 F.2d 803 (1st Cir.1988); *O'Riordan v. Long Island Bd. of Realtors, Inc.,* 707 F.Supp. 111 (E.D.N.Y.1988); *Buyer's Corner Realty, Inc. v. No. Ky. Ass'n of Realtors,* 410 F.Supp.2d 574 (E.D.Ky.2006). One federal court has held that a tied real estate association group faced competition and therefore created an unlawful tie; as explained below, however, we find that case distinguishable. *See Thompson v. Metro. Multi-List, Inc.,* 934 F.2d 1566 (11th Cir.1991).

Reifert argues that by comparing participation in Realtors Associations in areas where MLS services are "open" to individuals who have not joined a Realtors Association with so called "closed" areas that require membership in a Realtors Association, he can demonstrate that agents have been forced to purchase Realtors Association memberships. This comparison is unreliable, however, because it fails to speak to the central question of whether a competitor exists in this particular "closed" market and does not account for other possible explanations for the observed differences. Forcing individuals in Reifert's position to purchase a product they do not want is not a violation of antitrust law. *See Jefferson Parish Hosp. Dist. No. 2,* 466 U.S. at 16, 104 S.Ct. 1551.

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Even without an economic analysis, it is apparent that RASCW lacks competition. Each of the twelve organizations cited by Reifert fails to qualify as a competitor to the national or local Realtors Association:

1. Appraisal Institute (AI)covers only appraisers

2. Asian Real Estate Agent Association (AREAA)-serves a distinct ethnic community

3. Chinese American Real Estate Professionals Association (CAREPA)-serves a distinct ethnic community

4. Chinese Real Estate Association of America (CREAA)-serves a distinct ethnic community

5. Colorado Association of Exclusive Buyer Agents (CAEBA)-covers only exclusive buyer agents

6. Massachusetts Association of Buyer Agents (MABA)-covers only exclusive buyer agents

7. National Association of Exclusive Buyer Agents (NAEBA)-covers only exclusive buyer agents

8. National Association of Independent Fee Appraisers (NAIFA)-covers only appraisers

9. National Association of Hispanic Real Estate Professionals (NAHREP)-serves a distinct ethnic community

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10. National Association of Independent Real Estate Brokers (NAIREB)-serves only independent brokers

11. National Association of Real Estate Appraisers (NAREA)-covers only appraisers

12. National Association of Real Estate Brokers (NAREB)-primarily devoted to the needs of minority brokers

The district court relied heavily upon the First Circuit's decision in *Wells Real Estate*. We believe that decision effectively captured the central flaw in Reifert's argument.

> [The plaintiff] has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board but for the power exerted by the lure of the defendants' MLS. There is no evidence that a substantial volume of "commerce" in board membership was foreclosed by the tie-in. The tying claim must fail absent any proof of anti-competitive effects in the market for the tied product.

Wells Real Estate, Inc., 850 F.2d at 815 (footnotes omitted).

While the organizations the plaintiff named may provide important services, they simply do not compete with RASCW or any other Realtors Association. These niche associations lack cross-price elasticity with the national and local Realtors

Associations, and have dissimilar purposes. These organizations are unlikely substitutes for a Realtors Association in Wisconsin.

Instead of providing the district court with the required economic analysis, Reifert employs a 30-year old decision from this Court, *Beatrice Foods Co. v. FTC,* 540 F.2d 303, 308 (7th Cir.1976), to frame his discussion of competition. *Beatrice Foods Co.* relied upon the Supreme Court's decision in *Brown Shoe Co.,* 370 U.S. at 325, 82 S.Ct. 1502, and set forth several "practical indicia" to determine a market's boundaries. "These indicia are (1) the industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors." *Beatrice Foods Co.,* 540 F.2d at 308. While the "practical indicia" named in *Brown Shoe* and *Beatrice Foods Co.* are important considerations in defining a market, they were never intended to exclude economic analysis altogether. Both opinions recognized the importance of economic analysis, including cross-price elasticity of demand. *See Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502 ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *see also Beatrice Foods Co.,* 540 F.2d at 308.

This Court has emphasized the use of economic analysis in the law. To demonstrate competition in an antitrust case, the plaintiff must provide an economic analysis of the relevant market. *See, e.g., Menasha,* 354 F.3d 661 (requiring

economic evidence to prove the existence of a distinct market). Lacking any economic evidence, Reifert has failed to show that the tying arrangement has foreclosed any portion of the market for real estate services.

The facts of the instant case stand in contrast to the situation analyzed by the Eleventh Circuit in *Thompson.* The defendants in *Thompson* operated an MLS system and tied MLS access to membership in a Realtors Association. The Plaintiff, Empire Real Estate Board, was "founded in 1939 as an African American professional association because, at that time, the Realtors [Association] excluded African Americans from membership." *Thompson,* 934 F.2d at 1570. The plaintiffs proved that as a result of the tie and the prohibitive cost of joining two groups, 400 brokers either did not join or quit the Empire Real Estate Board. *Thompson* held that where a competitor offering similar services loses four hundred members because of a tie between an association of real estate agents and an MLS service, there has been a substantial effect on interstate commerce. *Id.* at 1578. In our case, however, the plaintiff has not presented an organization equivalent to Empire Real Estate Board. *Thompson* presented a valid competitor; neither *Wells* nor the instant case does. Thus, *Thompson* demonstrated a substantial effect on interstate commerce, while Reifert has not.

Having found no competitors, there are many issues raised in the parties' briefs that we need not reach. We need not decide whether the quantity of interstate commerce affected is "not-insubstantial," nor must we address whether

SCWMLS has a sufficient economic interest in the sales of the tied product to satisfy the fourth element of an unlawful tying arrangement.

B. Group Boycott Claim

Reifert also asks this Court to consider the district court's grant of summary judgment to the defendants on his group boycott claim. A group boycott traditionally occurs when a particular group or individual is prohibited from joining an organization. "Where there are no exclusionary conditions attached to Realtor board membership, and there is no contention that the cost is prohibitively high, it is difficult to see any affront to competition." *Pomanowski v. Monmouth County Bd. of Realtors,* 89 N.J. 306, 446 A.2d 83, 92 (N.J.1982). In the instant case, no licensed real estate agent was denied access to SCWMLS because of an anti-competitive measure.

To prove a group boycott, a plaintiff must establish that the membership requirement has had an adverse impact upon competition in the market for the tied product. As stated above, Reifert has failed to demonstrate the existence of a competitive market for Realtors Association memberships. Thus, there is no need to balance the pro-competitive effects of the Realtors Association membership requirement against its anti-competitive effects. *See Buyer's Corner Realty, Inc.,* 410 F.Supp.2d at 583-84 (citing *O'Riordan,* 707 F.Supp. at 116).

C. Anti-Competitive Effects of the Code of Ethics

Reifert claims that Article 16 of the Code of Ethics of the National Association of Realtors is anti-competitive and violates Section I of the Sherman Act, 15 U.S.C. § 1. Article 16 prohibits members of the National Association of Realtors from interfering with the exclusive agreements other members have established with clients.

Reifert's allegations concerning the anti-competitive effects of Article 16, however, are overly broad. As the National Association of Realtors, Code of Ethics Standard of Practice 16-2 states, "Article 16 does not preclude Realtors® from making general announcements to prospects describing their services[.]" Rather, the Article's purpose is to prevent the targeted solicitation of individuals who have exclusively listed their property with another agent and to prevent agents from improperly using multiple listing services as a data bank of potential customers.

We must review a challenge to Article 16 under the rule of reason to determine whether the agreement contributes to competition and productivity. *See Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 695, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). Under the rule of reason, Reifert had the burden to demonstrate that Article 16's net effect was anti-competitive. *See Bi-Rite Oil Co. v. Ind. Farm Bureau Co-op. Ass'n, Inc.,* 908 F.2d 200, 203 (7th Cir.1990).

The balance between pro- and anti-competitive effects weighs heavily in favor of Article 16. Even in "open" MLS areas such as Massachusetts and Alaska, where individuals

who have not joined a Realtors Association may access an MLS service, users must agree not to solicit the exclusive listings of other MLS users during the term of the listing. If agents were reluctant to post their listings, for fear that other agents would steal their clients, the market would become less transparent and less efficient. Article 16 aids competition and fulfills the purposes of the Sherman Act by providing a more transparent marketplace.

III. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

WOOD, *Circuit Judge*, concurring in the judgment. Although I agree without reservation with the majority's conclusion that the district court correctly granted summary judgment for the defendants in this case, I am concerned that some aspects of its opinion are in tension with the governing Supreme Court doctrine on tying arrangements. For the reasons I explain briefly here, I would take a more cautious approach, and leave further developments in tying law to the high court.

In *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958), the Supreme Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at 5-6, 78 S.Ct. 514. As the Court later made clear in *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2,

104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), however, "every refusal to sell two products separately can not be said to restrain competition." *Id.* at 11, 104 S.Ct. 1551. The trick is to distinguish between tying arrangements that are invalid and those that are innocuous, from a competitive standpoint. In *Jefferson Parish,* the Court explained the difference as follows:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Id. at 12, 104 S.Ct. 1551. Going on, over the objection of Justice O'Connor (who concurred in the judgment because of this point), the majority had this to say about the analytical approach toward tying arrangements:

> *Per se* condemnation-condemnation without inquiry into actual market conditions-is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences.

Id. at 15-16, 104 S.Ct. 1551. The Court went on to describe the circumstances under which that probability would exist:

first, there must be a substantial potential for impact on competition, which would be shown if a substantial volume of commerce is foreclosed by the arrangement; second, anticompetitive forcing must be likely, which is the case when it is probable that the seller has market power. *Id.* at 16-17, 104 S.Ct. 1551. If the seller does not have "either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product," then the *per se* rule cannot be used and the arrangement must be assessed under a full rule of reason. *Id.* at 18, 104 S.Ct. 1551.

Despite Justice O'Connor's forceful opinion concurring in the judgment, in which she argued that the time had come to jettison the *per se* rule in tying cases, see *id.* at 35, 104 S.Ct. 1551, and despite the opportunity it had as recently as March 2006 to take that step, see *Illinois Tool Works Inc. v. Independent Ink, Inc.*, __ U.S. __, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006), the Court has refused to do so. *Illinois Tool Works* held only that the fact that a tying product is patented does not support a presumption that the seller has market power over that product. *See* 126 S.Ct. at 1291. It concluded that "tying arrangements involving patented products should be evaluated under the standards applied in cases like *Fortner II* and *Jefferson Parish* rather than under the *per se* rule applied in *Morton Salt* and *Loew's,*" both cases involving intellectual property (patents in *Morton Salt,* copyrights in *Loew's*). In my view, *Illinois Tool Works* thus stands only for the proposition that a plaintiff must prove that a holder of intellectual property has "either the degree or the kind of market power that enables him to force customers" to purchase the tied product. If a plaintiff can do

so, then the framework established by *Jefferson Parish* continues to apply.

In the case before us, we must decide whether Reifert has produced enough evidence to survive summary judgment with respect to the allegation that the defendant Realtors Associations have tied the multi-listing service (MLS, the tying product) to membership in the Realtors Association of South Central Wisconsin, Inc. (RASCW, the tied product). The district court concluded that Reifert had not come forward with the requisite evidence. I agree. The D.C. Circuit offered a useful summary of the elements of a tying case in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C.Cir.2001):

> There are four elements to a *per se* tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.

Id. at 85. Here, I am willing to say that Reifert has brought forth enough evidence to permit a trier of fact to rule in his favor on the first three of those elements. His proof fails, however, on the fourth.

The key point is not the measurement of how much commerce in the tied product market was affected. It is the fact that Reifert offered no evidence to show that there was any foreclosure in the tied product market. As far as we can

tell from this record, no one refrained from joining any other organization because of the cost of membership in the Realtor Associations (RASCW and the others) before us. This is what distinguishes our case from the Eleventh Circuit's opinion in *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566 (11th Cir.1991). In that case, the court explicitly rested its decision on foreclosure, to which it referred as the "coercion element," explaining that "plaintiffs need to show that [defendant] Metro not only has [ ] market power but also has wielded this market power to force brokers to alter their choice of professional associations." *Id.* at 1577. It then reported that the evidence in the record showed "that 400 of Empire's prospective and current members did not join Empire or quit Empire because of the prohibitive cost." *Id.* at 1578. This is precisely the type of showing that Reifert failed to make.

Analytically, the majority may well be right that the rule of reason approach it sees in *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203 (7th Cir.1985), would be a more sensible way to approach all tying cases. But it is not for this court to anticipate the Supreme Court's overruling of its earlier decisions, even if the passage of time and the impact of later cases that create doctrinal tensions are evident to all. Just as we did in *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir.1996), overruled by *State Oil Co. v. Khan*, 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997), we should limit ourselves to pointing out the problems we see and then attempting to apply the law as it stands as best we can. In the present case, unlike *State Oil*, faithful application of the existing law leads to the same outcome as the more ambitious approach the majority has

chosen. For that reason, I am happy to concur in the outcome that the majority reaches, but I must respectfully decline to join its opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED AUGUST 25, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-969-S

JAY REIFERT,

Plaintiff,

v.

SOUTH CENTRAL WISCONSIN MLS CORPORATION, REALTORS ASSOCIATION OF SOUTH CENTRAL WISCONSIN, INC., ROBERT L. COURTER, SUSAN MATHEWS, DAVID STARK, ROBERT WEBER, THOMAS BUNBURY, MAURICE W. HILL, PETER SVEUM, MARSHALL ZWYGART and DAVID MCGRATH,

Defendants.

MEMORANDUM AND ORDER

Plaintiff Jay Reifert commenced this anti-trust action alleging that defendant South Central Wisconsin MLS Corp. ("SCWMLS") unlawfully ties the sale of its services to the purchase of services from its corporate parent, defendant Realtors Association of South Central Wisconsin, Inc. ("Realtors"). Plaintiff also alleges that conditioning access to MLS services on membership in Realtors is an unlawful

group boycott. Plaintiff named as defendants the individual directors of SCWMLS (collectively, "individual defendants"). Jurisdiction is based on 28 U.S.C. § 1331. The matter is presently before the Court on cross motions for summary judgment. The following is a summary of relevant undisputed facts.

FACTS

Defendant Realtors is a real estate professionals trade association and the owner of 100% of SCWMLS' stock. It offers services to its members including arbitration and mediation, enforcement of a code of ethics, education courses, professional recognition, referral programs, contract forms, legal information, conventions, publications, lobbying, website, and social functions. As a condition of membership Realtors requires members to join the Wisconsin Association of Realtors ("WAR") and the National Association of Realtors ("NAR"). NAR offers additional services including use of the "Realtors" trademark, an annual conference, a magazine and membership discounts. Defendant Realtors generally accepts as a member any licensed real estate professional who agrees to abide by the NAR code of ethics and pays the fees.

In 2005, annual fees to join all three associations are $441. Realtor dues are established by members who are elected to the board of directors. Dues are set solely to cover anticipated cost of operations and there is no attempt to make a profit. On March 18, 2005 RASCW had 2419 members, including 2306 real estate licensees and 113 appraisers.

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Defendant SCWMLS operates a multiple listing service which includes a computerized data base of homes and properties for sale in south cental Wisconsin. To participate in the multiple listing service members must pay $90 per quarter. Fees are set by members elected to the board of directors. Fees are set solely to cover anticipated cost of operations and there is no attempt to make a profit. Licensed real estate brokers who are members of any local association of Realtors may participate in the SCWMLS multiple listing service. A high percentage of broker represented residential property sold in south central Wisconsin is listed in defendant's MLS. On March 18, 2005 only 84 of the 2306 real estate professionals who were Realtor members did not use SCWMLS. On March 18, 2005 SCWMLS gave access to 331 members of local Realtor associations other than defendant Realtors. SCWMLS operates the only multiple listing service primarily within Dane, Sauk and Columbia Counties.

Plaintiff is a licensed real estate broker in south central Wisconsin and the principal of Excel Exclusive Buyer Agency since 1997. He has been a member of Realtors and a participant in SCWMLS since 1988. He wants to continue his participation in SCWMLS but does not want to continue his membership in Realtors. He has continued his membership in Realtors solely to gain access to the multiple listing service.

According to a survey by plaintiff's expert Riddle, between 19 and 24% of Dane county SCWMLS users would not join Realtors if they were not required to join to gain access to the multiple listing service. In Massachusetts and

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Alaska where multiple listing service access does not require membership in a local Realtors association more than 20% of MLS users do not belong to a Realtors association.

The National Association of Exclusive Buyer Agents ("NAEBA"), Colorado Exclusive Buyer Agents Association ("CEBAA"), and Massachusetts Association of Buyers Agents ("MABA") are associations of real estate professionals who are exclusive buyer agents. Plaintiff is a member of NAEBA, which offers services specific to representations of buyers. He knows of only one other exclusive buyer agent in Wisconsin eligible to join. CEBAA and MABA offer membership in Colorado and Massachusetts, respectively.

The Appraisal Institute ("AI"), National Association of Independent Fee Appraisers ("NAIFA"), and National Association of Real Estate Appraisers ("NAREA") are associations of professional real estate appraisers. They offer certifications, professional standards, education, appraisal databases, software, insurance, legislative monitoring, membership directories, conferences and commercial discounts. Annual membership fees for AI are $740. AI Membership requires payment of local chapter dues which are $110 in Wisconsin. NAIFA dues are $400 per year. NAREA dues are $215 per year.

The Asian Real Estate Agent Association ("AREAA"), Chinese Real Estate Association of America ("CREAA"), Chinese American Real Estate Professional Association ("CAREPA") and the National Association of Hispanic Real Estate Professionals ("NAHREP") are associations of real

estate professionals which promote the advancement and interests of ethnic communities. They offer networking, education, websites, lobbying, information resources and community service events. CREAA and CAREPA are headquartered and hold meetings in California. CAREPA is supported by the California Association of Realtors and NAR. Annual dues for these organizations are as follows: AREAA $100, CREAA $30, CAREPA $100, NAHREP $99.

The National Association of Independent Real Estate Brokers ("NAIREB") is open exclusively to brokers who are not affiliated with a franchised real estate company. NAIREB offers referrals, education networking and a magazine. It encourages members to join Realtor associations. NAIREB annual dues are $79.

MEMORANDUM

A *per se* tying violation requires proof of four elements: (1) a tying arrangement between two distinct products or services, (2) sufficient market power in the tying market to restrain free competition in the tied product market, (3) a substantial effect on interstate commerce, (4) the tying company has an economic interest in the sales of the tied product. *Carl Sandburg Village Ass'n No. 1 v. First Condominium Development Co.*, 758 F.2d 203, 207. (7th Cir.1985). Plaintiff argues that each of the elements has been established as a matter of law. Defendants contend that plaintiff has failed as a matter of law to adequately establish the third or fourth elements and that factual disputes preclude summary judgment on the other elements. Additionally, defendants seek summary judgment based on a statute of limitations defense and the absence of antitrust injury.

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Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Under *Rule 56(e)* it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Viewing the facts and drawing inferences most favorable to plaintiff, there is insufficient evidence for a fact finder to find that a tie between the defendant's multiple listing service and Realtor membership has had an effect on interstate commerce as that element has been defined by the Supreme Court. A tying arrangement is a violation of antitrust law only if a substantial volume of commerce is foreclosed by the tie. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). "Similarly, when a purchaser is "forced" to buy a product he would have otherwise bought even from another in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." *Id.*

Two courts of appeal have considered this requirement in the context of a tie between MLS access and Realtor association membership. In *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803, 815 (1st Cir.1988) the Court upheld a directed verdict dismissing the claim, reasoning as follows:

> However, Wells' action is indeed fatally affected by the excerpt from *Hyde* quoted above. Wells has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board but for the power exerted by the lure of the defendants' MLS. There is no evidence that a substantial volume of "commerce" in board membership was foreclosed by the tie-in.

In contrast, the Eleventh Circuit found a substantial effect on commerce resulting from an MLS-Realtor board tie. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir.1991). One of the plaintiffs in *Thompson*, Empire Real Estate Board, provided services similar to the defendant real estate board. Empire was established in 1939 to serve African American real estate professionals at a time when the local Realtor association excluded them. Both boards continue to exist and to provide a similar range of services to members. Evidence established that 400 members of Metropolitan would have been members of Empire but for the MLS-Realtor board tie. The Court found a substantial foreclosure of competition based on the facts.

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The issue before this Court is whether plaintiff has brought forth sufficient evidence from which a fact finder could conclude that competition in the south central Wisconsin real estate services market has been foreclosed by the SCWMLS tie to defendant Realtors. In an effort to meet its burden plaintiff has presented survey evidence from Wisconsin and statistical analysis from other markets, that supports the finding fewer real estate professionals would join defendant Realtors in the absence of the tie. This evidence suggests that about 20% of Realtor members would not join if they could obtain MLS services without membership. The law is clear, however, that merely establishing that customers purchased an unwanted product does not establish foreclosure of competition. *Jefferson Parish*, 466 U.S. at 16. "When there are no rival sellers of the tied product, then the alleged tie-in might affect a substantial volume of commerce in the tied product and yet not foreclose anyone." 9 Phillip A. Areeda, et. al., *Antitrust Law*, ¶ 1723 (2d ed.2004).

In an effort to demonstrate foreclosure plaintiff has produced a laundry list of entities that he asserts are competitors in the market for the services provided by defendant Realtors. However, examination of the undisputed facts about these entities and the related expert report does not suggest that they are in the same product market with defendant Realtors. While it is true that there is superficial overlap in the offerings of these associations-conventions, websites, education, publications, lobbying-these similarities do little to establish that any are competing in the same product market with Realtors. Virtually all professional organizations offer such services while undoubtedly serving different product markets.

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Services are in the same market when they are good substitutes for one another. That is, when there is "interchangeability of use or the cross elasticity of demand between the product and the substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Furthermore, plaintiff bears the burden to prove by econometric evidence that the products are good substitutes. *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir.2004). "[O]bserving things that to the untutored eye seem to be substitutes need not mean they *are* good substitutes." *Id.* Not only has plaintiff failed to bring forth econometric evidence, its proffered competitive associations do not appear to be good substitutes even to the "untutored eye."

Three of the associations, NAEBA, CEBAA and MABA, serve only exclusive buyer agents. The latter two serve agents in Colorado and Massachusetts and are therefore unlikely to be substitutes for services provided in Wisconsin even if the services offered were similar. Plaintiff, who is a member of NAEBA, has testified that the Realtors and NAEBA offer distinctly different services because NAEBA is directed specifically to the concerns of buyer agents. He testified that he joined NAEBA without regard to his membership in Realtors and that he knew of only one other real estate professional in Wisconsin eligible to join NAEBA.

Three other associations, AI, NAIFA and NAREA are devoted to providing services to real estate appraisers. An unlikely substitute for the far more general services offered to real estate professionals by Realtors.

Appendix B

Four additional associations which plaintiff suggests as substitutes, AREAA, CREAA, CAREPA and NAHREP, serve distinct ethnic communities and have as their purpose the advancement of those communities and real estate professionals within them. It seems unlikely that their services would be substitutes for Realtors. This inference is further supported by the fact that one of the organizations, CAREPA, is affiliated with the California Association of Realtors and NAR thereby dispelling any suggestion that they are competitors. Similarly, NAIREB is devoted to the needs of independent brokers apparently providing services unique to their needs while encouraging membership in Realtor associations.

Not only do none of these associations appear to be good substitutes, plaintiff has not offered evidence of a single real estate professional who has joined one of these organizations instead of Realtors or who has declined to join because he or she is a member of Realtors. The lack of such evidence is in stark contrast to the evidence in *Thompson* that 400 brokers fell into those categories. Furthermore, the dramatic differences in membership costs between the organizations and Realtors belies the suggestion that they are substitutes in the same product market.

On June 30, 2005 plaintiff offered a supplemental expert testimony of Riddle in the form of an analysis of non-random markets throughout the United states which purports to demonstrate that some of the alleged substitutes have higher membership rates in areas where there is no MLS tie ("open MLS") than in areas where there is such a tie ("closed MLS"). Defendants have objected to this evidence as untimely and inadmissible under Rule 702.

Appendix B

The supplemental report is untimely. The existence of competing real estate service providers in the relevant product market whose sales were foreclosed is an essential element of plaintiff's claim. Yet the initial expert report, filed within the time requirement of Rule 26(a)(2)(C), included nothing that would support this element. In fact, when he was deposed after issuing the report Riddle denied any opinion concerning whether other providers were in the same product market as Realtors. Riddle deposition of June 23, 2005 at 26-27. In light of the prevailing law it was apparent that this element would be critical to proving the claim. It is inappropriate to introduce expert testimony on this element under the guise of "rebuttal" simply because defendants subsequently denied the existence of the element. Under such circumstances exclusion is mandated by Rule 37(c)(1) unless the delay was harmless, an argument not made by plaintiff and unlikely to be sustained based on the prior deposition responses indicating that the expert would have no opinion on the topic.

Even if the belatedly disclosed expert testimony was admitted there appears to be little relevant, probative value in the analysis. It is likely that markets for professional real estate services are different in California, Georgia, Alaska and Massachusetts and Wisconsin. For example, the proffered competing organizations are directed at specific ethnic communities yet there is no apparent effort to control for the significant differences in populations between markets. Comparison of the data indicates great disparities in membership rates within the open and closed markets which suggest that other factors, far more than open or closed status, impact membership rates.

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Whatever minimal value the survey might have it is certainly not evidence that the organizations included in the survey are in the same product market as Realtors. Riddle, who conducted the analysis and offered the evidence, expressly testified at his deposition that the comparison of membership rates between open MLS and closed MLS markets does not demonstrate that the associations are in the same product market as defendant Realtors and that he has not done any analysis that would support such a conclusion. Riddle deposition of June 23, at 31. He further testified that demonstrating that the associations competed in the same product market would require an analysis of comparative prices and price movements and an analysis of specific services offered by the compared providers. *Id.* at 30. No such analysis has been proffered even in the belated supplemental report.

Viewing the facts most favorable to plaintiff, he has failed to offer evidence sufficient to sustain a finding that there are competing providers of services in the tied product market whose sales have been foreclosed by the tie between MLS and Realtors. Accordingly, summary judgment must be granted in favor of defendants. The Court does not address the merits of the additional independent bases for judgment offered by defendants.

Plaintiff offers far less evidence or argument in support of his group boycott claim. To sustain such a claim plaintiff must demonstrate that the anti-competitive effects of the membership requirement outweigh any anti-competitive effects of the membership rule. Initially, plaintiff must demonstrate that the membership requirement has an adverse

impact on competition in the relevant market. *Bi-Rite Oil Co., Inc. v. Indiana Farm Bureau Co-op. Ass'n, Inc.*, 908 F.2d 200, 203 (7th Cir.1990). Plaintiff has not demonstrated that he or any other real estate professional was denied access to the MLS. His evidence in support of anti-competitive effect consists of referencing arguments made in support of the tying claim which have previously been rejected as establishing an anti-competitive effect.

In opposition to summary judgment plaintiff merely argues that defendants have failed to meet their burden to prove the absence of anti-competitive effects. This argument misapprehends the summary judgment process which permits a defendant to put the plaintiff to its proof merely by asserting the absence of evidence to support a particular element of plaintiff's claim. *Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir.2001). For the reasons set forth in the analysis of the tying claim, plaintiff has failed to provide evidence sufficient to sustain a finding of anti-competitive effect from the membership requirement. Accordingly, there is no need to proceed to a balancing of pro-competitive effects of the rule. Defendants are entitled to summary judgment on the group boycott claim.

Appendix B

ORDER

IT IS ORDERED that plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered against plaintiff in favor of defendants dismissing plaintiff's complaint with prejudice and costs.

Entered this 25th day of August, 2005.

BY THE COURT:

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 12, 2006

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 12, 2006

Before

Hon. Joel M. Flaum, *Chief Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

No. 05-3601

JAY REIFERT,

Plaintiff-Appellant,

v.

SOUTH CENTRAL WISCONSIN MLS CORPORATION, REALTORS ASSOCIATION OF SOUTH CENTRAL WISCONSIN, INC., ROBERT L. COURTER, SUSAN MATTHEWS, DAVID START, ROBERT WEBER, THOMAS BUNBURY, MAURICE W. HILL, PETER SVEUM, MARSHALL ZWYGART and DAVID MCGRATH,

Defendants-Appellees.

Appendix C

ORDER

On consideration of the petition for rehearing filed in the above case on June 26, 2006, by the plaintiff-appellant, all of the judges on the original panel have voted to deny this petition. The petition is therefore DENIED.

Supreme Court, U.S.
FILED
FEB 2 - 2007
OFFICE OF THE CLERK

(2)

No. 06-815

IN THE

Supreme Court of the United States

JAY REIFERT,

Petitioner,

v.

SOUTH CENTRAL WISCONSIN MLS CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that a rule of respondent South Central Wisconsin MLS Corp. requiring membership in an association of Realtors® as a condition of participation in the MLS was not an unlawful tying arrangement under Section 1 of the Sherman Act, where there was no evidence of any competitors in the alleged "tied" market for general real estate association services and where petitioner was free to join any of several competing associations of Realtors®.

2. Whether the Court of Appeals correctly held that a rule of non-party National Association of Realtors® preventing MLS participants from soliciting sellers of properties listed on the MLS during the term of the exclusive listing did not violate Section 1 of the Sherman Act, where petitioner offered no evidence of anticompetitive effects, the rule is necessary to induce brokers to place their listings on the MLS, and the rule does not prevent MLS participants from soliciting the seller for other properties or from soliciting the listing property after expiration of the exclusivity period.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondent South Central Wisconsin MLS Corp. is a wholly-owned subsidiary of respondent Realtors® Association of South Central Wisconsin ("RASCW"). RASCW has no parent corporation, and there is no publicly held company that owns 10% or more of RASCW.

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NAR, *Code of Ethics and Standards of Practice* (Jan. 1, 2007), *available at* http://www.realtor.org/mempolweb.nsf/pages/printable2007Code 20, 21, 22

STATEMENT OF THE CASE

Respondent Realtors® Association of South Central Wisconsin, Inc. ("RASCW") is an association of real estate professionals in south central Wisconsin. It is affiliated with the Wisconsin Realtors® Association ("WRA") and the National Association of Realtors® ("NAR"). In order to join RASCW, one must also join the WRA and NAR. Membership in RASCW is generally open to any licensed real estate professional who agrees to abide by the NAR Code of Ethics and pays the applicable fees.

RASCW's membership benefits include the opportunity to participate in a multiple listing service ("MLS") operated by RASCW's wholly owned subsidiary, respondent South Central Wisconsin MLS Corp. ("SCWMLS"). SCWMLS also permits members of other associations of Realtors® to participate in the MLS. It does not, however, offer MLS participation to real estate licensees who choose not to join an association of Realtors®.

Petitioner Jay Reifert is a residential real estate broker in Wisconsin. Petitioner has been a member of both RASCW and SCWMLS for almost 20 years. Neither RASCW nor SCWMLS has ever tried to bar him from membership.

Petitioner filed this lawsuit because he wishes to participate in SCWMLS but does not want to be a member of RASCW or any other association of Realtors®. He alleged that the SCWMLS rule limiting participation in the MLS to members of a Realtor® association ("Membership Rule") constitutes an unlawful tying arrangement in violation of Section 1 the Sherman Act, 15 U.S.C. § 1. Specifically, petitioner alleged that the Membership Rule effectively tied Realtor® association membership (the "tied" product) to MLS participation (the "tying" product) and resulted in harm to competition in the tied product market – that is, the market in which Realtor® associations compete. Petitioner also alleged

that the Membership Rule constituted an unlawful group boycott.

The parties filed cross motions for summary judgment. The United States District Court for the Western District of Wisconsin granted respondents' motion for summary judgment and denied petitioner's motion.

The Seventh Circuit affirmed the district court's ruling in all respects. First, regarding petitioner's tying claim, the Seventh Circuit explained that a necessary element of illegal tying is foreclosure of competition in the tied product market and that such foreclosure cannot exist unless there is at least one other competitor in the tied product market. (Pet. App. 9a). The Seventh Circuit then examined each of the following associations proposed by petitioner as competitors to RASCW, NAR, and other Realtor® associations:

Appraisal Institute
Asian Real Estate Agent Association
Chinese American Real Estate Professionals Association
Chinese Real Estate Association of America
Colorado Association of Exclusive Buyer Agents
Massachusetts Association of Buyer Agents
National Association of Exclusive Buyer Agents
National Association of Independent Fee Appraisers
National Association of Hispanic Real Estate Professionals
National Association of Independent Real Estate Brokers
National Association of Real Estate Appraisers
National Association of Real Estate Brokers

Finding that these associations have specified purposes that set them apart from the more generalized associations of Realtors®, the Seventh Circuit concluded that petitioner had failed to adduce evidence from which a jury could find that any of these associations were in the same product market as RASCW or NAR. (*Id.* at 12a-14a).

Second, the Seventh Circuit affirmed summary judgment for respondents on petitioner's group boycott claim. (Pet. App. 16a). The court found that, for the same reasons that petitioner's tying claim failed, petitioner also failed to establish anticompetitive effects in any relevant market under his group boycott claim. (*Id.*).

Third, the Seventh Circuit addressed petitioner's new claim – which he had failed to plead in his complaint below – that Article 16 of the NAR Code of Ethics violates Section 1 of the Sherman Act. (Pet. App. 17a).[1] Article 16 prevents a Realtor® from contacting a seller who has a current exclusive listing agreement with another Realtor® for purposes of arranging to enter into a new listing agreement to begin when the exclusive agreement ends. The Seventh Circuit found that this requirement has procompetitive benefits because, without this assurance, brokers would be reluctant to share their listings through the MLS for fear that other agents would steal their clients. (*Id.* at 17a-18a). Thus, under the rule of reason, it was incumbent on petitioner to produce evidence of anticompetitive effects to outweigh these procompetitive effects. (*Id.* at 17a). Petitioner produced no such evidence, and summary judgment for respondents was therefore proper.

Petitioner's request for rehearing of the Seventh Circuit's decision was denied.

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[1] The district court did not address this theory of liability in awarding respondents summary judgment, presumably because it was not pleaded in petitioner's complaint.

REASONS FOR DENYING THE PETITION

I. THE SEVENTH CIRCUIT CORRECTLY APPLIED WELL-ESTABLISHED LAW IN FINDING THAT PETITIONER FAILED TO ADDUCE SUFFICIENT EVIDENCE TO SURVIVE SUMMARY JUDGMENT.

Petitioner does not dispute the fundamental proposition of tying law which underlies the Seventh Circuit's decision – namely, that in order to demonstrate the requisite foreclosure of competition in the tied product market, a plaintiff must identify at least one other competitor in that market. (*See* Pet. App. 9a-10a). This is because, where there is no competitor, there is no competition to be foreclosed. Instead, petitioner merely disagrees with the court's finding that he failed to adduce any evidence of such a competitor. The Supreme Court should not review this essentially factual issue – particularly where the Seventh Circuit did nothing more than apply well-established law to the evidence presented.

A. The Seventh Circuit's "Economic Evidence" Requirement Does Not Conflict With Precedent And Was Properly Applied.

Petitioner first takes issue with the Seventh Circuit's requirement that he present "economic evidence" in order to demonstrate which entities fall within the tied product market. (Pet. 8-9). The Seventh Circuit explained:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 ... (1962).
>
> This Court requires that a plaintiff prove that products are good substitutes using economic evidence; a conclusory assumption of competition where products or services appear to be similar is insufficient. *See*

> *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir. 2004). Actual data and a reasonable analysis are necessary to demonstrate that a product or service is a good substitute for another. "Economics, like other social sciences, has its share of counterintuitive findings, so observing things that to the untutored eye seem to be substitutes need not mean that they *are* good substitutes." *Id.* [2]

(Pet. App. 10a-11a). Contrary to petitioner's unsupported assertions (*see* Pet. 7, 9, 12), the Seventh Circuit did not hold that such economic evidence must always be presented by an economist's expert testimony. Rather, it relied on the unremarkable proposition that the boundaries of a relevant product market are to be determined by use of economic evidence and analysis – not by mere conclusory assertions.

Petitioner argues that the Seventh Circuit's economic evidence requirement conflicts with the Supreme Court's decision in *Brown Shoe* – a 1962 decision in which the Supreme Court identified certain "practical indicia" which may be used in determining the relevant product market. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). However, the Seventh Circuit correctly explained that, "[w]hile the 'practical indicia' named in *Brown Shoe* ... are important considerations in defining a market, they were never intended to exclude economic analysis altogether." (Pet. App. 14a). The Seventh Circuit further noted that *Brown Shoe* itself:

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[2] Petitioner reads this quotation as acknowledging that his evidence "tended to prove that the trade association service products of the thirteen firms 'seem to be substitutes' and the Seventh Circuit's ruling was 'counterintuitive.'" (Pet. 23 n.9). This is nonsense. The Seventh Circuit was merely citing another decision's explanation as to why economic analysis is necessary. Indeed, the Seventh Circuit later found that, "[e]ven without an economic analysis, it is apparent that RASCW lacks competition." (Pet. App. 12a).

> recognized the importance of economic analysis, including cross-price elasticity of demand. *See Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502 ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.")."

(*Id.*).

Petitioner next argues that the Seventh Circuit's economic evidence requirement conflicts with decisions from the Sixth, Ninth, and Eleventh Circuits. (Pet. 9-11). This is not so.[3]

First, in *Foundation for Interior Design Education Research v. Savannah Collage of Art & Design*, the district court granted the plaintiff's motion to dismiss the defendant's antitrust counterclaim, and the Sixth Circuit affirmed. 244 F.3d 521 (6th Cir. 2001). Explaining that "[d]ismissal is appropriate if the definition of the relevant market ... is 'implausible' or 'not tenable,'" the district court rejected the defendant's proposed market definition because defendant's counsel had admitted at oral argument that defendant in fact competed in a broader market. *Foundation for Interior Design Education Research v. Savannah Collage of Art & Design*, 73 F. Supp. 2d 829, 837, 838 (W.D. Mich. 1999). These decisions have nothing to do with the type or quantum of evidence required to define a market on summary judgment.

Far from conflicting with a decision of the Sixth Circuit, the decision below squarely accords with an essentially identical ruling of that Court. Specifically, in *Buyer's Corner Realty, Inc. v. Northern Ky. Ass'n of Realtors, Inc.*, 198 Fed.

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[3] Petitioner also claims the circuits are "requesting guidance" on market definition principles, but he identifies no such requests. (Pet. 23). Rather, petitioner only cites statements by courts that market definition may be counterintuitive or confusing. (*Id.*).

App'x 485 (6th Cir. 2006) (per curiam), *petition for cert. filed*, No. 06-936 (U.S. Jan. 3, 2007), the Sixth Circuit summarily affirmed a decision of a Kentucky district court that addressed a membership rule identical to the rule at issue in this case – and that upheld the rule on grounds essentially identical to those offered by the Seventh Circuit. In light of the Sixth Circuit's affirmance in *Buyer's Corner*, it simply cannot be argued that there is a conflict between the Sixth and Seventh Circuits.[4]

Second, in *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991), the court stated that the plaintiff real estate association "competes in the market for professional affiliation with the Realtors." However, the Eleventh Circuit did not even discuss the market definition issue or how it came to this conclusion, and there is no indication that the appropriate market definition was even disputed by the parties. The Eleventh Circuit's omission of any economic evidence analysis on this issue is hardly a holding that such evidence is not required where the market definition is disputed. *See Estate of Magnin v. Commissioner*, 184 F.3d 1074, 1077 (9th Cir. 1999) ("When a case assumes a point without discussion, the case does not bind future panels."); *In re Stegall*, 865 F.2d 140, 142 (7th Cir. 1989) ("A point of law merely assumed in an opinion, not discussed, is not authoritative.").[5]

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[4] In another recent unsuccessful lawsuit attacking an identical MLS membership rule, the District Court for the Eastern District of Washington likewise found on summary judgment that the plaintiffs failed to identify any competitors to Realtor® associations. *See Prencipe v. Spokane Bd. of Realtors*, No. CIV-04-0319-LRS, 2006 WL 1310402, at *2 & n.4 (E.D. Wash. May 16, 2006).

[5] Indeed, the distinction between *Thompson* and this case is essentially one of fact. The Eleventh Circuit's ultimate finding – that competition had been foreclosed in the tied product market – was based on evidence that, "as a result of the tie and the prohibitive cost of joining two groups, 400 brokers either did not join or quit" the plaintiff board. (Pet. App. 15a

Finally, in *Lucas Automotive Engineering, Inc. v. Bridgestone/ Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir. 2001), the plaintiff survived summary judgment because it produced economic evidence of lack of price sensitivity between products. In other words, the Ninth Circuit applied the same legal principle as did the Seventh Circuit. The facts, however, were entirely different.

Not only are petitioner's cited decisions not in conflict with the Seventh Circuit, but each of these other Circuits has held in other decisions that some sort of economic evidence is required for a plaintiff to define properly the relevant market. *See Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004) (rejecting market definition that was not based on a cross-price elasticity analysis), *cert. denied*, 126 S. Ct. 334 (2005); *Colsa Corp. v. Martin Marietta Servs., Inc.*, 133 F.3d 853, 855 n.4 (11th Cir. 1998) (per curiam) ("We have stated that '[c]onstruction of the relevant economic market or a showing of monopoly power in that market cannot be ... based upon lay opinion testimony.'") (alteration and omission in original); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 (9th Cir. 1996) (affirming summary judgment for defendants and rejecting

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(*citing Thompson*, 934 F.2d at 1578)). By contrast, petitioner did not, and could not, offer such evidence here. Indeed, he did not point to a single individual – not even petitioner himself – who declined to join another association because he or she was required to join RASCW, WRA, and NAR. Instead, petitioner tried to introduce evidence that certain professionals simply do not wish to join RASCW. (Pet. 23). But even putting aside the substantial statistical inadequacies of petitioner's evidence in this regard, it is well established that merely being forced to purchase an unwanted product does not create foreclosure in the tied product market. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) ("when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed"), *abrogated on other grounds, Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006).

expert's "'anecdotal'" market definition). The Circuits are thus in accord that economic evidence is required in order to demonstrate the relevant product market in an antitrust lawsuit.

In addition to arguing that he need not introduce any economic evidence at all, petitioner also contends that he did introduce economic evidence which was incorrectly rejected by the Seventh Circuit because it was not presented through expert testimony. (Pet. 7, 12). However, the absence of expert testimony is *not* the reason that the Seventh Circuit rejected the evidence introduced by petitioner. Rather, the Seventh Circuit rejected plaintiff's purported economic evidence as both unsound and irrelevant.

As described in his brief, petitioner tried to compare real estate association membership rates in so-called "open MLS" areas with rates in "closed MLS" areas (that is, areas where the MLS allows non-Realtors® to join, and areas where it does not). (Pet. 24-25). Petitioner claimed that this comparison demonstrated an increase in membership rates for the allegedly competing associations over Realtor® associations in "open MLS" areas. (*Id.*).

The Seventh Circuit rejected petitioner's comparison for two reasons. First, the Seventh Circuit observed that the comparison "does not account for other possible explanations for the observed differences." (Pet. App. 11a). In other words, in direct contravention of well-established statistical methods, petitioner's comparison did not control for other variables that might affect association membership from place to place. As the district court explained:

> It is likely that markets for professional real estate services are different in California, Georgia, Alaska and Massachusetts and Wisconsin. For example, the proffered competing organizations are directed at specific ethnic communities yet there is no apparent effort to control for the significant differences in

> populations between markets. Comparison of the data indicates great disparities in membership rates within the open and closed market which suggest that other factors, far more than open or closed status, impact membership rates.

(*Id.* at 34a). This failure to control for other variables, as well as petitioner's failure to test for whether the observed differences were statistically significant, rendered his comparison unreliable and inadmissible. *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000) (affirming summary judgment for defendants where plaintiff failed to control for other, non-discriminatory factors that may have caused statistical differences); *Coates v. Johnson & Johnson*, 756 F.2d 524, 537 n.11 (7th Cir. 1985) (explaining the importance of testing for statistical significance).

Second, the Seventh Circuit found petitioner's comparison to be "unreliable ... because it fails to speak to the central question of whether a competitor exists in this particular 'closed' market." (Pet. App. 11a). Indeed, as the district court noted, petitioner's own expert witness "expressly testified at his deposition that the comparison of membership rates between open MLS and closed MLS markets does not demonstrate that the associations are in the same product market as defendant Realtors and that he has not done any analysis that would support such a conclusion." (*Id.* at 35a). While petitioner attempts to paint his comparison as a cross-price elasticity analysis (Pet. 24-25), that comparison simply does not examine – as a cross-price elasticity analysis must – whether changes in price for Realtor® association membership affect demand for the other allegedly competing associations. Thus, whatever probative value petitioner's comparison has, it simply does not speak to whether these associations are in the same product market.

In sum, the Seventh Circuit's requirement that the relevant market be delineated through economic evidence is consistent with the precedent both of this Court and of other Circuits.

Petitioner's real complaint is that the Seventh Circuit erred in finding his purported "economic evidence" to be unreliable and irrelevant to the market definition issue – a fact-based argument that is both meritless and unworthy of this Court's time and resources.

B. The Seventh Circuit Also Correctly Found That The Undisputed Evidence Demonstrated That The 12 Associations Proffered By Petitioner Do Not Compete With Associations Of Realtors®.

Even if one were to accept, *arguendo*, petitioner's position that the Seventh Circuit should not have required petitioner to present economic evidence regarding the relevant product market, this conclusion would not alter the Seventh Circuit's ultimate finding – based on an examination of all the evidence that petitioner did present – that petitioner failed to present evidence from which a jury could find the existence of competitors to RASCW or NAR in the tied product market. Petitioner points to no circuit split regarding the manner in which the Seventh Circuit analyzed this evidence. Instead, he appears to be asking this Court simply to correct the Seventh Circuit's alleged mistakes in the application of law to the facts of this case. This Court should decline petitioner's invitation.

As petitioner recognizes in his brief, "'[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" (Pet. 8 (quoting *Brown Shoe*, 370 U.S. at 325). Petitioner argues that he presented evidence of such reasonably interchangeable "substitutes", but that the Seventh Circuit rejected the evidence on the grounds that it was not presented through expert testimony. (*Id.* at 12).

The Seventh Circuit did no such thing. Rather, the court examined each of the 12 associations proffered by petitioner and concluded that, "[e]ven without an economic analysis, it

is apparent that RASCW lacks competition." (Pet. App. 12a). As the court explained, each of petitioner's proffered associations targets a specific subset of real estate professionals – for example, appraisers, independent brokers, or members of certain racial and ethic minority groups. (*Id.* at 12a-12b). Due to these "dissimilar purposes", these "niche associations" offer different kinds of services and are thus "unlikely substitutes for a Realtors Association in Wisconsin." (*Id.* at 13a-14a).

Petitioner argues that the Seventh Circuit improperly focused on "the degree to which the buyer populations of the thirteen firms differed, when it should have focused on the amount of overlap." (Pet. 19). However, this argument misconstrues the Seventh Circuit's analysis. The Seventh Circuit did not find that the proffered associations do not compete with Realtor® associations merely because they have different types of members. Rather, the point is that the differing focus of these associations impacts the types of *services* they provide, thus rendering those specifically-tailored services different from, and inadequate substitutes for, the more general services that Realtor® associations provide.

Petitioner seems to advance the notion that the existence of overlapping customers alone – for example, some appraisers belong to both NAR and the National Association of Real Estate Appraisers – demonstrates that the associations are in the same product market. (*See* Pet. 18). But this notion is meritless. In a given neighborhood, many people may shop at both the local grocery store and the local department store, but no one would suggest that these stores therefore compete in the same product market.

Rather, as petitioner later acknowledges, "[o]verlapping customers does not force a conclusion that the products are in the same market.... '[T]he relevant inquiry remains whether the differences in type render the products poor substitutes.'" (Pet. 18-19) (quoting *Telcor Commc'ns, Inc. v. Southwestern*

Bell Tel. Co., 305 F.3d 1124, 1132 (10th Cir. 2002)). As to this inquiry, petitioner produced no evidence whatsoever that the 12 proffered associations are good substitutes for NAR or RASCW. For example, perhaps most glaringly, he did not present any testimony – lay or expert – that consumers find NAR or RASCW's services to be interchangeable with or good substitutes for the more specialized services provided by the other 12 associations.

Quite to the contrary, petitioner's own testimony dooms his argument with respect to at least one of the associations – the National Association of Exclusive Buyer Agents ("NAEBA"). Petitioner is a member of NAEBA, which serves only exclusive buyer agents. (Pet. 2). At his deposition, petitioner expressly testified that NAEBA offers distinctly different services than NAR:

> Q: Do you see NAEBA membership and Realtor[®] Association membership as being good substitutes for each other in terms of membership in a trade association?
>
> A: I can tell you I've never really thought of it that way. I would say that there are substantive differences between the two organizations for sure and what is offered between the two organizations, so no.
>
> Q: What are those differences?
>
> A: Again, the National Association of Exclusive Buyer Agents only focuses on buyer representation, whereas the National Association of Realtors[®] and the other Realtor[®] organizations have the full gamut of services and things that relate to seller representation, dual agency, transaction brokerage in the states where it applies. So there's just an entirely different universe in that fashion.

(Reifert Dep. at 100-01). Petitioner also testified that he belongs to both NAEBA and NAR because NAEBA provides services not provided by NAR and that he would prefer to belong to NAEBA over NAR even if NAEBA were more expensive. (*Id.* at 100-02). It is ironic that, given his own testimony, petitioner is still trying to advance the notion that NAEBA and NAR are in the same product market because they offer the same services and are good substitutes.

Rather than introduce evidence of interchangeability, petitioner relied exclusively on a chart illustrating that some or all of the associations provide services falling in the following categories – certifications, standards, education, publications, insurance, directories, credit cards, discounts, networking, advocacy, website, conventions, and hotline. (Pet. 5). However, petitioner ignores the crucial question: What *kind* of certifications, standards, education, etc.? Unless these and other services cover substantially similar subject matters, they do not indicate that the associations compete in the same product market as one another. For example, the American Medical Association and the American Bar Association each provide certifications, standards, and education. Yet no one would argue that they are competitors of each other – or of Realtor® associations.

As the district court observed:

> While it is true that there is superficial overlap in the offerings of these associations – conventions, websites, education, publications, lobbying – these similarities do little to establish that any are competing in the same product market with Realtors. Virtually all professional organizations offer such services while undoubtedly serving different product markets.

(Pet. App. 31a). Petitioner offered no evidence at all concerning the subject matter of the various associations' services – other than the associations' names, of course,

which clearly indicate differing subject matter tailored to specific subsets of real estate professionals.

In a final, inflammatory attack on the Seventh Circuit's reasoning, petitioner argues that the court's finding that associations serving minority communities are not in the same product market as Realtor® associations "makes sense" only if one "read[s] NAR as Caucasian" and "assume[s] NAR does not support minority members in real estate." (Pet. 14, 15; *see also id.* at 30 ("Nine federal judges have now ruled that trade associations of realty agents interested in supporting the interests of Asians, Hispanics, African-Americans, and other minorities, must be excluded as competitors of NAR for skin color reasons.")). But it is petitioner's position, not the Seventh Circuit's, that makes no sense. Under the Seventh Circuit's reasoning, NAR is not seen as Caucasian or not supporting minorities. Rather, it is recognized as serving and supporting *all* races with no particular focus – thus making its services different than those of other associations that tailor their services to the needs and interests of specific minority groups.

Petitioner also strangely asserts that there was "no evidence in the record" to support the Seventh Circuit's conclusion that certain associations "serve[d] a distinct ethnic community." (Pet. 13 (alteration in original); *see also id.* at 14-15). This is wrong. For example, the president of the National Association of Real Estate Brokers (NAREB) testified at his deposition that NAREB focuses on minority real estate agents and on creating home ownership opportunities for Americans of minority race or status. (Branch Dep. at 7). And in his opening brief to the Seventh Circuit, petitioner himself stated that NAREB "was founded on, and has a tradition of, representing minority members active in real estate." (Pl. Br. 21).

With respect to the other associations, petitioner produced scant evidence concerning their operations. However, their names alone demonstrate their focus on specific ethnic

commu[illegible]s: the Asian Real Estate Agent Association, the Chinese American Real Estate Professionals Association, the Chinese Real Estate Association of America, and the National Association of Hispanic Real Estate Professionals. Further, that these associations also allow non-minorities to join (*see* Pet. 14-15) does not change the fact that their services remain tailored to minority communities and thus differ from the more general services offered by associations of Realtors®.

This Court has long recognized that, to be in the same product market, products must be reasonably interchangeable. *See Brown Shoe*, 370 U.S. at 325. The Seventh Circuit did nothing more that apply this concept and find that petitioner had not submitted any evidence from which a jury could find that any of the 12 diverse, specialized associations proffered by petitioner compete in the same product market as the more general Realtor® associations. There is no reason for the Supreme Court to disturb this finding.

C. The Seventh Circuit Did Not Err By Deciding An Issue Of Market Definition On Summary Judgment.

Petitioner next argues that the Seventh Circuit erred because market definition is a question of fact that must always be left to the jury to decide and can never be decided on summary judgment. (Pet. 19). He also claims that the Supreme Court has never decided "whether market definition is for the court or jury" and should address this "important question" of "first impression." (*Id.* at 20). But market definition is no different for these purposes than any other issue. The courts need only apply – as the Seventh Circuit did here (Pet. App. 5a-6a) – the time-tested summary judgment standards articulated in Fed. R. Civ. P. 56(c), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and other Supreme Court precedents.

Under Rule 56, the relevant inquiry on summary judgment is whether "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As this Court explained in *Anderson*, a factual issue is "'genuine'" only if a "reasonable jury" could find for the non-moving party. *Anderson*, 477 U.S. at 248. In the case of market definition, the question thus becomes: could a reasonable jury find that the nonmoving party's proposed market definition is correct? This inquiry does not change simply because market definition is considered a question of fact. Rather, summary judgment remains appropriate where a reasonable jury could not find, based on the evidence presented, that the nonmoving party's market definition is correct.

Following these standards, courts have found that market definition issues may be decided on summary judgment where appropriate. For example, in *Colsa Corp. v. Martin Marietta Services, Inc.*, 133 F.3d 853 (11th Cir. 1998), the Eleventh Circuit noted: "we disagree with Colsa's contention that merely because the definition of 'relevant' market' is a factual question, summary judgment is inappropriate. Summary judgment is clearly available even for factual issues." *Id.* at 855 n.4. *See also Metro Indus.*, 82 F.3d at 848 (affirming summary judgment for defendant because there was insufficient evidence concerning the relevant market); *Flegel v. Christian Hosp. Ne.-Nw.*, 4 F.3d 682, 689-91 (8th Cir. 1993) (affirming summary judgment because there was insufficient evidence to support plaintiffs' proposed market definition.); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 481 (3d Cir. 1992) (en banc) (affirming summary judgment because plaintiff's evidence did not support its proposed market definition).

Further, contrary to petitioner's contention, the decisions he cites do not hold that market definition issues must always reach the jury. In *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir. 1996), the

First Circuit considered whether to reverse a jury's verdict, stating: "we must bear in mind that 'market definition is a question of fact' and 'we therefore must affirm the jury's conclusion *unless the record is devoid of evidence upon which the jury might reasonably base its conclusion.*'" *Id.* at 196 (emphasis added). The court also stated: "Although Costal has properly pointed out that the question of market definition is one of fact for the jury, a plaintiff *must present sufficient evidence from which a reasonable jury could find the existence of the proposed relevant market.*" *Id.* at 197 (emphasis added). The court then went on to find – as a matter of law – that the jury's market definition was incorrect and reversed the jury's monopolization verdict. *Id.* at 198-99.

Similarly, in *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984), the court stated that "[m]arket definition is a question of fact, and we therefore must affirm the jury's conclusion *unless the record is devoid of evidence upon which the jury might reasonably base its conclusion.*" *Id.* at 825 (emphasis added) (citation omitted). And in *Thompson*, the Eleventh Circuit stated that "[t]he parameters of a given market are questions of fact, and therefore summary judgment is inappropriate *if there are material differences of fact.*" *Thompson*, 934 F.2d at 1573 (emphasis added) (citation omitted). Thus, each of these decisions recognizes that, while market definition is considered a question of fact, it can be decided on summary judgment where the plaintiff fails to submit evidence sufficient to support his proposed definition.

In addition to arguing that market definition can never be decided on summary judgment, petitioner also tries to reduce his burden by asserting that he need only make a "'minimal'" or "'modest'" showing regarding the existence of competitors in the tied product market. (Pet. 20). But no court has accepted this proposition, and the cases cited by petitioner provide him no support. In *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803 (1st Cir. 1988), the First Circuit required plaintiff to show that there was some

minimal amount of foreclosure in the tied product market; it did not reduce the plaintiff's burden of proof in so showing. *Id.* at 815 n.11. Moreover, the "modest showing" mentioned in *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), applied to a showing of market power in the *tying* product market, not the existence of competitors in the *tied* product market. *Id.* at 841. And *Thompson* made no mention of a lower burden of proof for this element of a tying claim. *See Thompson*, 934 F.2d at 1570-79.

In sum, petitioner failed to produce evidence from which a reasonable jury could find that any of the 12 associations proffered compete in the same product market as RASCW, NAR, or any other association of Realtors®. The Seventh Circuit's finding was not error, and there is no reason for the Supreme Court to grant certiorari.

II. THE SEVENTH CIRCUIT'S ANALYSIS OF ARTICLE 16 OF THE NAR CODE OF ETHICS DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT.

Petitioner also seeks review of the Seventh Circuit's rejection of his theory of liability premised upon Article 16 of NAR's Code of Ethics. He asserts that the decision of the Court of Appeals conflicts with *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). (Pet. 20-22). However, there is no conflict. The Seventh Circuit properly applied the rule of reason in finding that petitioner could not survive summary judgment.[6]

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[6] Review of the Seventh Circuit's decision regarding Article 16 is also inappropriate because it was not even presently properly in the district court. Petitioner's First Amended Complaint did not even mention Article 16, much less allege that it violates the antitrust laws. Petitioner never sought leave to amend his complaint in order to add this theory of liability or to add NAR – which promulgated Article 16 – as a defendant. *See Rosenfeld v. Lion Mfg. Corp*, 253 F.2d 90, 93 (7th Cir. 1958) ("[I]t is axiomatic that plaintiff cannot recover upon a cause of action different from that upon which his complaint is based."); *Bender v. Southland*

To begin, petitioner failed to allege even that he had been harmed by Article 16 in any way. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-42 (1990) (a plaintiff must show antitrust injury stemming from the defendant's conduct). Article 16, Standard of Practice 16-2, on which petitioners focuses, prevents a Realtor® from contacting a seller who has a current exclusive listing agreement with another Realtor® and arranging to enter into a new listing agreement to begin when the exclusive agreement ends. NAR, *Code of Ethics and Standards of Practice*, art. 16, 16-2 (Jan. 1, 2007), *available at* http://www.realtor.org/mempolweb.nsf/pages/printable2007Code ("NAR Standard of Practice"). However, petitioner represents only buyers and never takes listings from sellers. Thus, this application of Article 16 does not restrain petitioner at all.

Petitioner also argues that Article 16 prevents him from contacting a seller who has a current exclusive listing agreement with another Realtor® to sell one home and arranging to enter into an agreement to represent that seller in the purchase of another home. However, Article 16 does no such thing. NAR Standard of Practice 16-3 expressly states:

> Article 16 does not preclude REALTORS® from contacting the client of another broker for the purpose of offering to provide, or entering into a contract to provide, a different type of real estate service unrelated to the type of service currently being provided (e.g., property management as opposed to brokerage) or from offering the same type of service for property not subject to other brokers' exclusive agreements.

Thus, petitioner is in fact entirely free to approach a seller who is under an exclusive listing agreement to sell one property in order to discuss representing the seller in buying a different property. It is remarkable that petitioner simply

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Corp., 749 F.2d 1205, 1215 (6th Cir. 1984) (refusing to consider theory of antitrust liability that was not pleaded in the complaint).

ignores this provision, despite it having been pointed out to him in the court below.[7]

More fundamentally, even putting aside the fact that Article 16 does not restrain petitioner in particular, Article 16 does not violate the antitrust laws at all. In *Professional Engineers*, the National Society of Professional Engineers prohibited its members from negotiating fees with, or providing any sort of pricing information to, clients prior to their selection for a project. *Professional Eng'rs*, 435 U.S. at 683-85. This Court found the absolute "ban on competitive bidding" unlawful under the rule of reason (not under the *per se* rule, as petitioner suggests). *Id.* at 695.

Despite petitioner's hyperbole and repeated attempts to mischaracterize Article 16, the factual circumstances here are completely different from those in *Professional Engineers*. Article 16 does not place any restrictions on Realtors® in competing for listings when a seller first decides to hire a broker. Article 16 also does not prevent Realtors® from soliciting listings and competing on all terms after an exclusive listing agreement has expired. (NAR Standard of Practice 16-8).

Even during the term of an exclusive listing agreement, Article 16 prevents brokers only from specifically targeting and making the initial contact with a seller who has an

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[7] NAR Standard of Practice 16-3 further states that "information received through a Multiple Listing Service or any other offer of cooperation may not be used to target clients of other Realtors® to whom such offers to provide services may be made." This does not mean that petitioner cannot contact those clients. It means only that he cannot use the MLS as a database of potential clients. Such limitation on the use of MLS information is entirely reasonable, as the MLS does not exist to provide petitioner with leads for obtaining new clients. Instead, an MLS exists in order to help its participants bring buyers and sellers together. This restriction is also procompetitive, for the reasons discussed below. *See infra* p. 23. Petitioner remains free to target clients of other Realtors® as long as he does not use the MLS to identify those clients.

exclusive listing agreement in order to enter into another listing agreement on the same property. As long as the seller makes the initial contact, a broker is entirely free to discuss the terms of an agreement (including price) or to enter into an agreement which will commence when the exclusive listing is expired. (NAR Standard of Practice 16-6). And, as discussed above, brokers may solicit sellers in order to offer other services, such as buyer representation. (*Id.* 16-3). Brokers may also freely engage in general advertising, mailings, telephone canvassing, or other announcements. (*Id.* 16-2).

Given the limited actual scope of Article 16, the following statements in petitioner's brief are simply incorrect:

- "[H]e is forced to agree to NAR rules that prohibit him from contacting property owners who have current listings with other realty agents." (Pet. 2).[8]
- "NAR's non-solicitation rule prohibits Realtor association members from contacting sellers who have listed their properties with other Realtors." (*Id.* at 20).
- "[A] buyer agent would ordinarily want to send buyer-oriented literature to sellers in the MLS as the most efficient use of marketing resources. This is prohibited by NAR rules...." (*Id.* at 27).
- "The Seventh Circuit acknowledged NAR's rule, as imposed by RASCW, prohibits Reifert from contacting sellers to offer buyer-oriented services." (*Id.*).

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[8] In support of his reading of Article 16, petitioner states that, "[i]n deposition testimony, NAR expressly acknowledged that agents such as Reifert were prohibited from contacting sellers, even though no listings contracts would be violated." (Pet. 21). But petitioner conveniently fails to provide any citation to support this assertion, and there is no such citation. Petitioner also makes the false accusation – again without any record support – that "[t]he rules are enforced in secret prosecutorial sessions." (*Id.* at 27). This is simply not true.

Rather, it is only for the duration of the exclusive listing agreement that targeted solicitation of another's listing is banned – and for a procompetitive reason.

As the Seventh Circuit held, Article 16 promotes the effective functioning of SCWMLS because, without such an assurance, Realtors® would be reluctant to submit listings to the MLS, thereby revealing the names and addresses of their clients to competing MLS participants. And, "[i]f agents were reluctant to post their listings, for fear that other agents would steal their clients, the market would become less transparent and less efficient. Article 16 aids competition and fulfills the purposes of the Sherman Act by providing a more transparent marketplace." (Pet. App. 18a). Similarly, in granting summary judgment on an antitrust challenge to Article 16 in another lawsuit, the Eastern District of Washington noted that "[c]ourts have consistently regarded the non-solicitation rule as being pro-competitive, providing an inducement for brokers and consumers to participate in the MLS." *Prencipe v. Sopkane Bd. of Realtors*, No. CIV-04-1319-LRS, 2006 WL 1310402, at *3 (E.D. Wash. May 16, 2006).[9]

Indeed, as the Seventh Circuit further noted, the importance of a non-solicitation rule like Article 16 to a well-functioning MLS is demonstrated by the fact that state-wide MLSs in Massachusetts and Alaska (neither of which is affiliated with

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[9] Petitioner asserts that NAR "acknowledged that it had no factual basis whatsoever to justify" the restrictions of Article 16 as procompetitive. (Pet. 21; *see also id.* at 28 ("In record testimony, NAR admitted it was unaware of any harms avoided by the no-contact rule"). But petitioner provides no support for this bald assertion, which is incorrect. In the courts below, petitioner tried to support a similar statement by pointing to the deposition of Cliff Niersbach. However, Mr. Niersbach testified only that he was unaware of any "empirical evidence" regarding whether MLS participants would drop out of an MLS without Article 16. (Niersbach Dep. at 59). Mr. Niersbach further testified that, based on his almost 30 years of working with real estate brokers, he knows that Realtors® find Article 16 to be a valuable assurance protecting the listings that they place on the MLS. (*Id.* at 58).

NAR) similarly require their users to agree not to solicit the exclusive listings of other MLS users during the term of an exclusive listing agreement. (Pet. App. 17a-18a). Petitioner asserts that these rules "were far narrower, allowing more competition by agents, proving MLSs will function with less restrictive rules." (Pet. 22). But once again, he offers no explanation or support for this statement. Rather, deposition testimony from both MLSs reveals that their respective non-solicitation rules prohibit an MLS user from contacting sellers during the term of another MLS user's exclusive listing agreement in order to enter into a new agreement effective upon the expiration of the first one. (*See* Condon Dep. at 10; Freeman-Eaton Dep. at 14, 17).

In light of these considerations, petitioners' suggestion that Article 16 is *per se* illegal must be rejected. "Courts apply per se treatment only after 'considerable experience' with a particular business practice has inevitably resulted in a finding of anticompetitive effects." *United States v. Andreas*, 216 F.3d 645, 666 (7th Cir. 2000). "The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999). Moreover, the rule of reason applies where, as here, "horizontal restraints on competition are essential if the product is to be available at all." *NCAA v. Board of Regents*, 468 U.S. 85, 100-01 (1984). *See Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1374 (W.D. Wis. 1997) ("*[P]er se* illegality is limited to 'naked' restraints on trade and does not cover agreements that facilitate productive activity.... When the cooperative agreement contributes to productivity through integrated efforts, the Rule of Reason is the norm.")

As discussed above, Article 16 has productivity-increasing procompetitive benefits because it encourages participation in the MLS. Although petitioner disputes the value of such

benefits (Pet. 21-22), a challenge to Article 16 must be evaluated under the more searching rule of reason. *See California Dental Ass'n*, 526 U.S. at 778. ("The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA .... The point, rather, is that the plausibility of competing claims about the effects of [the defendant's conduct] rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.").

Under the rule of reason, the initial burden is on petitioner to demonstrate that the challenged conduct has anticompetitive effects in a relevant product market. *See Bi-Rite Oil Co. v. Indiana Farm Bureau Co-op. Ass'n*, 908 F.2d 200, 203 (7th Cir. 1990). Here, petitioner was so convinced that Article 16 is *per se* illegal that he did not produce *any* evidence of anticompetitive effects – for example, evidence of increased commission rates or other harm to consumers due to Article 16. Instead, petitioner relies entirely on his assertion that Article 16 prevents him from contacting certain sellers in order to offer his buyer representation services to them (Pet. 20-22) – a practice which is, in fact, expressly *permitted* under Article 16, and which petitioner fails to show results in any harm to consumers. *See supra* p. 20.

Because petitioner did not meet his burden of demonstrating anticompetitive effects under the rule of reason, the burden never even shifted to respondents to produce evidence of procompetitive effects. *See F.E.L. Publ'ns Ltd. v. Catholic Bishop*, No. 81-1333, 1982 WL 19198, at *8 (7th Cir. Mar. 25, 1982). Thus, petitioner's arguments against the procompetitive effects found by the Seventh Circuit (Pet. 22) are simply besides the point (not to mention incorrect). The burden was on petitioner to produce evidence of anticompetitive effects, and he did not do so. The Seventh Circuit was therefore correct in affirming summary judgment for respondents.

In a last ditch attempt to shore up his request for this Court to review the Seventh Circuit's decision, petitioner tries to somehow connect his complaint with the Department of Justice's currently-pending antitrust lawsuit against the National Association of Realtors® (Pet. 29) and with a report from the Government Accountability Office which allegedly found a lack of price competition between real estate brokers (*id.* at 26, 28). But as petitioner admits, the Department of Justice's lawsuit concerns NAR's rules governing brokers' display of listings on the internet. (*Id.* at 29). It has nothing to do with Article 16 or the Membership Rule challenged by petitioner here. Further, petitioner cites nothing – nor could he – suggesting that the Government Accountability Office's report attributes any of the alleged lack of competition in the real estate industry to the practices at issue in this lawsuit.

With respect to Article 16, petitioner's fundamental error was to assume that the *per se* rule would apply and thus neglect to introduce any actual evidence of anticompetitive effects. But as the Seventh Circuit held, the existence of procompetitive effects makes *per se* analysis inappropriate here. Rather, the rule of reason was the appropriate framework for analyzing Article 16. Petitioner failed to carry his burden under the rule of reason, and summary judgment for respondents was properly granted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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